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91.
VERMONT, SUPREME COURT
REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE HARVARD
LAW SCHOOL
LIBRARY
SUPREME COURT
OF THE

STATE OF VERMONT.

REPORTED BY THE JUDGES OF SAID COURT, AGREEABLY TO A STATUTE
LAW OF THE STATE.

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VOL. VII.

MIDDLEBURY:
KNAPP AND JEWETT, PRINTERS.
1836.

Rec. Nov. 17, 1838.

JUSTICES OF THE SUPREME COURT, AND, EX OFFICIO, CHANCELLORS
OF THE COURT OF CHANCERY, DURING THE TIME
EMBRACED IN THESE REPORTS.

For the Year ending October, 1831.

| | | |
|----------------------|-----------------------|------------------------------|
| TITUS HUTCHINSON, | <i>Chief Justice.</i> | |
| CHARLES K. WILLIAMS, | | } <i>Assistant Justices.</i> |
| STEPHEN ROYCE, JR., | | |
| EPHRAIM PADDOCK, | | |
| JOHN C. THOMPSON, | | |

For the Year ending October, 1832.

| | | |
|----------------------|-----------------------|------------------------------|
| TITUS HUTCHINSON, | <i>Chief Justice.</i> | |
| CHARLES K. WILLIAMS, | | } <i>Assistant Justices.</i> |
| STEPHEN ROYCE, JR., | | |
| NICHOLAS BAYLIES, | | |
| SAMUEL S. PHELPS, | | |
| | | |

For the Year ending October, 1833.

| | | |
|----------------------|-----------------------|------------------------------|
| TITUS HUTCHINSON, | <i>Chief Justice.</i> | |
| CHARLES K. WILLIAMS, | | } <i>Assistant Justices.</i> |
| STEPHEN ROYCE, JR., | | |
| NICHOLAS BAYLIES, | | |
| SAMUEL S. PHELPS, | | |
| | | |

For the Year ending October, 1834.

| | | |
|----------------------|-----------------------|------------------------------|
| CHARLES K. WILLIAMS, | <i>Chief Justice.</i> | |
| STEPHEN ROYCE, JR., | | } <i>Assistant Justices.</i> |
| SAMUEL S. PHELPS, | | |
| JACOB COLLAMER, | | |
| JOHN MATTOCKS, | | |
| | | |

For the Year ending October, 1835.

| | | |
|----------------------|-----------------------|------------------------------|
| CHARLES K. WILLIAMS, | <i>Chief Justice.</i> | |
| STEPHEN ROYCE, JR., | | } <i>Assistant Justices.</i> |
| SAMUEL S. PHELPS, | | |
| JACOB COLLAMER, | | |
| JOHN MATTOCKS, | | |
| | | |

ERRATA.

PAGE 27, line 26 from bottom, for "notes" read *deed*.

" 243, " 2 " for "couny" read *county*.

" 148, " 19 " for "stituted" read *instituted*.

" 150, " 25 " for "Marahall" read *Marshall*.

" 399, " 11 " for "received" read *revised*.

" 478, " 10 from top, for "petitioner" read *petitionee*.

" 151, in the case of Wood vs. Stewart, reverse the plaintiff and defendant attached to the names of counsel.

AN

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REPORTS.

CHITTENDEN COUNTY.

JANUARY TERM, 1835.

Present, Hon. CHARLES K. WILLIAMS, *Chief Justice.*

“ “ SAMUEL S. PHELPS, }
“ “ JACOB COLLAMER, } *Assistant Justices.*
“ “ JOHN MATTOCKS, }

AMOS BLODGET *vs.* ABRAM BRINSMAID, Administrator of JOHN CHITTENDEN,
COLLARD. *January,*
1835.

The mere representation of insolvency, without the appointment of commissioners on an estate, does not prevent creditors from sustaining actions against the administrator.

Showing the administrator has, as such, recovered final judgment for land, is *prima facie* evidence of assets.

Showing the intestate had given a quit-claim deed, which might cover the same land, does not rebut this evidence of assets, or account for the same.

This was an action of covenant broken, wherein the plaintiff declares, that in April, 1827, Collard executed a deed to the plaintiff of certain land in Burlington, and therein covenanted that he was well seized of the same in fee, whereas he was not seized thereof in fee, and that the same was then owned and possessed by one Proctor. To this the defendant pleaded, first, that said Collard was seized in fee of said land; on which issue was taken. Secondly, the defendant pleaded that he had fully administered, and that no money, goods, credits, lands or tenements of said Collard had ever come into the defendant's possession as administrator. To this the plaintiff replied, that goods, lands and tenements of said Collard had come to the defendant, as administrator,

CRITTENDEN,
January,
1835.
Blodget
vs.
Brinsmaid.

of great value ; on which issue was taken. Thirdly, the defendant pleaded he had represented the estate of said Collard as insolvent ; to which there was demurrer. On the trial of said issues, the plaintiff showed the deed and covenant of said Collard, declared on, and the breach thereof. On the issue of no assets, the plaintiff proved in evidence a final recovery in ejectment, in favor of said Brinsmaid, as administrator of said Collard, of certain land in Burlington, in December, 1834. The defendant adduced in evidence a quit-claim deed from said Collard to said Brinsmaid, dated Nov. 2, 1827, of all said Collard's right to lands in said Burlington and certain other towns, which deed was recorded the day of the trial of this cause. The court decided, that said recovery in ejectment, by the defendant, as administrator of said Collard, was *prima facie* evidence of assets in the hands of the administrator, and that it was not a proper accounting for the same by showing a prior deed to the defendant ; and rendered a judgment for the plaintiff ;—to which the defendant filed exception, and the cause passed to this court for revision.

H. Leavensworth for defendant.—1. The defendant in this cause contends, that he cannot be made liable for the breach of the covenant of seizin, made by said Collard, the intestate.

2. That the recovery of property by the defendant, as administrator, is not *prima facie* evidence of assets in his hands.

3. That it was a proper accounting for said property thus recovered, to show a prior deed from the intestate to the defendant.

4. This action cannot be maintained, because the estate of said Collard was represented insolvent.

4 Mass. Rep. 620, *Hunt vs. Whitney*. 12 do. 570, *Coleman vs. Hall*. 15 do. 264, *Paine vs. Nichols*.

C. Adams for plaintiff.—1. The recovery by Brinsmaid, as administrator of Collard, was evidence of assets in his hands.

2. The defendant is estopped by the judgment from showing any title out of Collard. The deed was not offered to show any disposition of the assets, but to show that there were none, and for this purpose it was inadmissible.

3. From these circumstances, it must be presumed, either that the deed was never delivered, and Brinsmaid found it among Collard's papers ; or, as it was never recorded, that Brinsmaid held it for some special purpose, which has long since been accomplished.

4. In order properly to account for these assets, the defendant

must show some legal disposition, since the recovery in ejectment, which is not pretended.

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January,
1835.

Blodget
vs.
Brinsmaid.

The opinion of the court was delivered by

COLLAMER, J.—The first question in this case, to be disposed of, arises on the demurrer to the plea, that the estate was represented insolvent. When an estate is represented insolvent, and commissioners are appointed to examine and adjust the claims, the statute has provided this new tribunal for the creditors; and therefore the courts of ordinary jurisdiction are superceded in relation to such claims. Most obviously, if no such tribunal is created, the creditors must be left to their ordinary course in the courts of common law, or they are without redress. It is urged, there may not have been time for the appointment of commissioners. This is no answer, as it requires, comparatively, little time, and might have been done even after suit, and been so pleaded; or want of time should have been pleaded as an excuse.

In this State, administration is granted of both the personal and real estate, and they are both assets. Most obviously, the recovery of a final judgment in ejectment, by an administrator, is at least *prima facie* evidence of assets.—The only remaining question relates to the effect of the deed from Collard to Brinsmaid, in 1827. It is to be recollected, it was a *quit-claim* deed of all Burlington, in 1827. In 1834, Brinsmaid, as administrator of Collard, claims and recovers land in Burlington. In the absence of other proof, it would not be presumed, Brinsmaid would, as administrator of Collard, claim land which he owned himself. The presumption would be, that Collard, after 1827, purchased the land, which his administrator recovered in 1834, and that the deed of 1827, being a *quit-claim* deed, Collard's subsequent purchase did not inure to the benefit of his former grantee. Had the defendant gone further, and showed this recovery for Collard was on a title prior to 1827, and that Brinsmaid had sued, as administrator of Collard, because of an adverse possession in a third person, in 1827 and onward, which prevented Brinsmaid from claiming on his own deed, it might have tended to show the land the property of Brinsmaid, and explained the recovery being in the name of Collard, or his administrator. But had even this been proved, it might still have been doubtful. The statute of 1807 declares the deed, when there is an adverse possession in a third person, void, but saves the covenants. Now if there be a warranty-deed, a subsequent purchase or recovery by the grantor inures to the grantee, by the legal effect of the warran-

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1835.

Blodget
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ty, to avoid circuitry of action. But if there be no warranty, perhaps the deed is in such case wholly void. In this case, however, the defendant put in no proof that the recovery was on a title in Collard before 1827, and so included in the deed to Brinsmaid; nor was that a deed with warranty, so that a subsequent purchase or recovery, by Collard, would inure to Brinsmaid. The land, therefore, recovered by the administrator, in 1834, remained assets in his hands.

Judgment affirmed.

CHITTENDEN,
January,
1835.

MOSES CATLIN vs. WILLIAM D. KIDDER.

The possession of a tenant in common is not presumed to be *adverse* to his co-tenant, until proved so to be.

Pernancy of profits for a length of time, especially if short of the statute of limitations, will not make the possession of a tenant in common *adverse*, or amount to an ouster of his co-tenant.

The tenant of a tenant in common is not estopped from purchasing the title of the other tenants in common; nor are their deeds to him, while in possession, void.

This was an action of ejectment for a lot of land in Colchester, known as the Hollister lot. On the trial, the plaintiff read in evidence a deed, dated May 24, 1814, from Bartholomew and Speedy Belden, of all the right they had to said lot, in the right of said Speedy, as sister and heir of Eunice Hollister. The defendant read five deeds, purporting to be from other heirs of said Eunice, conveying the other two thirds of said lot, and also the deposition of the said Speedy Belden, showing that the said grantors were the heirs of said Eunice Hollister. The plaintiff proved that he entered upon the land in 1817, (not fifteen years before the commencement of this action,) and cleared a part, and made improvements from year to year, until 1830;—that in 1823, one Carpenter was on, as tenant to the plaintiff, of part of said land, and conveyed to Burnham, who, by sundry conveyances, conveyed to the defendant, in 1830, who went into possession. The plaintiff also read in evidence a deed from said Bartholomew and Speedy Belden to the defendant, dated June 18, 1831.

Plaintiff insisted, that having entered on the land under a claim of title, and having had the exclusive possession, this possession was *adverse*, and he had acquired title to said lot;—that the de-

defendant, having purchased in the title of Carpenter, was tenant to the plaintiff, and was not at liberty either to dispute the title of Catlin, or to purchase in an outstanding title, if any existed, and that the deeds read by the defendant were void by the adverse possession of the plaintiff. The court decided, that if Catlin was the owner of one undivided part of the land, his possession was not adverse by reason of his exclusive possession, and that before his possession could be considered adverse, there must be such an ouster as would enable the other tenants in common to maintain ejectment against the plaintiff; and without such adverse possession, the statute of limitation did not begin to run; and that the deeds read by the defendant were not to be avoided; that it was competent for the defendant to purchase in an outstanding title, and that so far as his title covered the land, he might hold it. Under this charge, the jury returned a verdict for one third of said lot; and the plaintiff having filed exceptions, the cause comes to this court for revision.

CHITTENDEN,
 January,
 1835.

Catlin
 vs.
 Kidder.

C. Adams for the plaintiff.—1. The exclusive possession of Catlin, under a claim to the whole interest in the land, was of itself an adverse possession, and the court should so have charged the jury; or it was evidence from which the jury might infer that it was adverse, and the jury should have been permitted to weigh these presumptions and pass upon the fact.—*Fisher et al. vs Prosser*, Cow. 217.

2. The possession of a party entering upon land is characterized by the claim to the land. If the claim is to an undivided part, the inference of law is, that he enters for himself and co-tenants; whereas, if the claim is to the whole land, the presumption of law is, that the possession is adverse.—*Fisher et al. vs. Prosser. Shumway vs. Holbrook*, 1 Pick. 114.

3. If the possession of Catlin was adverse, the statute of limitations has run upon the claims of those under whom defendant holds; and not only so, but the deeds to the defendant are avoided.

4. Catlin having become seized of the land, and having obtained the exclusive, peaceable possession, had a right to resist the entry of all others, and to put them to the legal proofs of their claims upon the land.

5. Kidder, by purchasing in the title of Carpenter, who was tenant to Catlin, thereby assumes the relation of tenant to Catlin, and as such, has no right to dispute the title of Catlin, his landlord, nor to purchase in a paramount title, if any existed. Kidder cannot claim any other or greater right than Carpenter, but must re-

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January,
1835.

Catlin
vs.
Kidder.

turn to Catlin the peaceable possession which was received from him; and if he has any claim to the land, must be driven to his action subsequent to his surrendering to Catlin.—*Blake vs. Howe*, 1 Aiken, 306.

Lyman and Marsh for defendant.—1. The possession of a tenant in common is always presumed to be not adverse to his co-tenants, unless the contrary appears; and mere pernancy of the profits, for any length of time, will not render the possession adverse.—*Jackson vs. Tibbets*, 9 Cowen, 241. *Clapp vs. Brougham*, do. 530.

The case does not show that plaintiff ever claimed the entire estate, but that he entered under a release from a co-tenant of the defendant's grantors, which purported to convey, not the *lands*, but the grantor's *interest therein* only.

There was then no evidence from which the jury would be authorized to infer that the possession was adverse, and therefore the deeds to defendant were not, for that cause, void.

2. But it is said, that the defendant is estopped to deny Catlin's title, or to buy in an outstanding, adverse claim, because he has taken a release from one claiming under Catlin's lessee. The defendant does *not* deny the title of the plaintiff, so far as the plaintiff asserted it himself, to the share of Speedy Belden, and the estate acquired appears to have been not adverse to, but consistent with, Catlin's title. The position, therefore, is a mere *petitio principii*.

The opinion of the court was delivered by

COLLAMER, J.—It seems that Eunice Hollister died seized of the lot in question, leaving three sisters, heirs. In 1814, one of those sisters conveyed, not the land, but with her husband conveyed her interest in this lot to the plaintiff. The plaintiff, in 1817, went into possession, and by himself and tenants, one of whom was this defendant, continued possession until this suit, in 1831. In 1830, the other heirs of said Hollister conveyed their interest to the defendant. The main question in the case is, what was the nature of the plaintiff's possession? No man, taking possession of land, is presumed to be a trespasser. If he has a deed on record, that gives character or color to his possession, both as to its nature and extent; and he is presumed to possess according to his right, which, in this case, would be of an undivided third, in right of himself and his co-tenants. The case is entirely destitute of any proof, any ouster of the co-tenants, or any holding adverse to them. There

has been no period when they could have maintained ejectment against the plaintiff, and of course the statute of limitations has not commenced running against them. In the case of *Fisher et al. vs. Prosser*, (Cow. 217) there was such a great lapse of time, and other circumstances, that it was left to the jury to presume an ouster, which they found, as a matter of fact. Here no such circumstances existed to leave to the jury.

CHITTENDEN,
January,
1835.

Carlin
vs.
Kidder.

The defendant was tenant to the plaintiff, but he was tenant only of what the plaintiff was owner, that is, an undivided third part. It was therefore as competent for him, as for any other person, to purchase the other two thirds. This was not at war with his tenancy, or inconsistent with the relationship he sustained to the plaintiff, and the plaintiff not being in adverse possession of those parts, the deeds to the defendant were not void. But the defendant having taken and set up a deed from Belden of the third which the plaintiff owned and possessed, this was such an act of war in a tenant as amounted to an ouster of his landlord, and therefore entitled the plaintiff to sustain this action and recover for the part he owned.

Judgment affirmed.

WILLIAM P. BRIGGS vs. SAMUEL WHIPPLE.

CHITTENDEN,
January,
1835

In a plea of justification, by a collector, under a rate-bill and warrant to collect a tax, voted by a town, it is not necessary to set forth the purposes for which the tax was voted. Nor is it necessary to allege, that the town was a corporation, or to show any charter of incorporation.

This was an action of trespass, *de bonis asportatis*, brought against the defendant, who was collector of taxes for the town of Richmond. It came before the court upon a special demurrer to the defendant's plea in bar. The substance of this plea will be found incorporated into the opinion of the court. The following causes were assigned.

1. Because the said plea does not allege, that the town of Richmond is a corporation, empowered by law to assess and collect taxes of the inhabitants within its limits.

2. Because it is not alleged, in and by said plea, that the said William P. Briggs was liable, by law, to pay taxes in the said town of Richmond, on the said third day of January, 1832.

3. Because the said plea does not set forth the purpose for

CHITTENDEN,
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1835.

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vs.
Whipple.

which said tax was raised; nor is it in and by said plea alleged, that the said tax was raised for any or either of the purposes, for which towns may, by law, vote, assess and collect taxes; nor are the purposes for which towns may, by law, vote, assess and collect taxes, set forth in said plea.

And also, for that no certain or material issue can be taken upon the said plea. And also, for that the said plea is, in other respects, uncertain, informal and insufficient.

Joinder by the defendant.

Plaintiff, pro se.—1. The plaintiff can avail himself of any substantial defect in the defendant's plea, and of any defect of form which has been assigned as cause of demurrer.—1 Chitty, 642. 1 Saun. 337, b, n. 3.

2. The purpose for which the tax was raised, or to be raised, is not stated in the plea in bar.

3. It is not stated in the defendant's plea, that the tax was raised for any of those purposes for which towns may vote, assess and collect taxes.

4. Nor is it alleged, that the said town of Richmond voted a legal tax.

5. It does not appear from the pleadings, that the plaintiff was legally liable to pay the tax voted on the 31st Dec. 1831.

6. And if this court are bound to take notice, officially, of a corporation by the name of the town of Richmond, they are also bound to take notice of the statute, which limits their jurisdiction.

7. The plea being silent as to the purpose for which the tax was raised, the court is not to presume it was for a legal purpose, because nothing is to be presumed in favor of authorities of limited jurisdiction.—1 Vt. Rep. 81, *Bates vs. Hazeltine and Chipman*, and the authorities there cited. 4 Vt. Rep. 601, *Water vs. Davis*.

8. He who attempts to justify the taking of his neighbor's property, by virtue of some law, must show himself within all the provisions of that law.

9. It is not alleged, that the rate-bill was certified or signed by the select-men, or that it was a legal one.

10. It is not alleged, that the rate-bill and warrant were directed to the constable, Whipple, by the select-men or any one else.

11. The plea does not state the manner in which the defendant disposed of the property distrained. Saying he disposed of it according to law, is not sufficient. He should state particularly his doings, and the court are to judge whether or not it is disposed of

according to law.—*Hawes vs. Maynard*, 9 Mass. 242. *Brewster vs. Jones*, 7 Mass. 288. Story Plead. 108.

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C. Adams for defendant.—1. It is distinctly stated in the plea, that the plaintiff was an inhabitant of Richmond, having taxable property and a list in said town.

2. It was not necessary to aver in the plea, that the town of Richmond was a corporation empowered by law to assess taxes.

The plea alleges, that, at a meeting, &c. the inhabitants voted, &c. This is all that is usually done, and all that is requisite. Intendments of law should never be stated, and there are many things which courts are bound to presume from other facts stated. Thus in this case, from the fact, that the inhabitants of Richmond, in town meeting, lawfully assembled, voted &c., the court will infer that they were legally authorized to vote. In declaring upon, or justifying under a judgment, it is never alleged that the cause of action was within the jurisdiction of the court; and the law is the same, whether the court is of limited or general jurisdiction. If the opposing party wishes to contest the power of the court, he can reply a void judgment.

3. It was not necessary to set forth the purpose for which the tax was raised, nor to aver in the plea, that the purpose was within the legitimate power of the town. The defendant is a public officer, and entitled to the favorable notice of the court. All that can be required of the constable is, to show from the records of the town a *prima facie* legal tax; and if the plaintiff, who is an inhabitant of the town, wishes to controvert the tax, he should put the legality of the meeting in issue.

The acts and doings of all public bodies are presumed to be within their jurisdiction. This is an intendment of law, applicable as well to municipal corporations, as to courts and legislatures. Pleading would become intolerably prolix, if the grounds and purposes of their acts were to be thus spread out. In declaring upon or justifying under an act of the legislature, or judgment of a court, no one ever thought of setting out their jurisdiction, or the preliminary proceedings on which the act or judgment is founded. The act or judgment simply is set forth. If there is any difference, municipal corporations are entitled to greater latitude of presumption, from the fact that they have not the same facilities for keeping accurate records. It was not necessary, therefore, to set out the warning, nor the doings of the meeting, *in extenso*. It was sufficient to aver, that, at a meeting legally warned and holden, it was voted, &c.

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It would seem, from an examination of the statute, that towns, at their annual March meetings, might vote taxes without any article in the warning to that effect; probably from the fact, that all the inhabitants are then presumed to be assembled. At least, there is no law requiring such notice. The statute, (p. 414,) provides, that when meetings are called, other than in the month of March, a notification shall be set up, containing the subject of the business, and the design of the meeting; but this requirement would be satisfied, by saying the design was to raise a tax, without detailing the objects to which the tax was to be devoted. From the fact, that the doings of this same meeting have frequently been before the courts, it has become matter of public notoriety, that the notification was particular and the doings of the meeting detailed at large; but we contend the constable was by no means bound to set them forth in his plea.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—This case comes before us on a demurrer to the defendant's plea in bar. All that is required in a plea of this nature is, that the facts, which justify the taking, should be stated. If the taking was justifiable, by virtue of a regular warrant, and the defendant neglected to proceed with the property distrained, so as to become a trespasser, *ab initio*, such neglect should be set forth in the replication. It was wholly unnecessary for defendant to state his proceedings subsequent to the taking.—*Andrews vs. Chase*, 5 Vt. Rep. 409. The general allegation, that in all things the defendant proceeded according to law, would unquestionably have been bad, if it was necessary for him in his justification to state any thing which he did with the property after he first took it. But as this was not necessary, if the plea is without objection in other respects, it must be adjudged sufficient. The plea in justification states, that he, the defendant, was appointed a collector, qualified and sworn;—that the plaintiff was an inhabitant of the town of Richmond, having taxable property therein;—that at a meeting of the inhabitants of said town of Richmond, legally warned, &c., they voted a tax of twelve cents on the dollar, on the list of 1831;—that the select men made out a rate-bill of said tax, apportioned the same to the several persons liable to pay taxes in the town, and that, among others, the plaintiff was assessed, or his tax apportioned, at the sum of three dollars and ninety-two cents, in said rate-bill;—that a warrant was issued by a justice of the peace, directed to the defendant, as collector of said tax, com-

manding him to collect the same ;—that he, as collector, applied to the plaintiff, showed him the rate-bill, and requested payment ;—that plaintiff refused ;—that he gave notice when he would attend to receive said tax ;—that he attended at the time and place, demanded payment of the plaintiff, and on his neglect and refusal to pay the tax aforesaid, he entered upon the premises and levied on the horse in question.

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The sufficiency of these allegations, or of this plea, is now to be determined. It is objected to it, that there is no allegation that the town of Richmond is a corporation, or that the plaintiff was liable to pay taxes, and that the purpose for which the tax was voted is not stated. Certain other informalities have also been objected to, but the real controversy between the parties is stated in the foregoing objections.

With respect to the first objection, it may be observed, that, although it may be generally true, that where a justification is relied on, founded upon the acts of a corporation, the existence or charter of incorporation must be set forth, especially where the corporation is a private one, or created for private purposes ; and although it has been considered, that this principle extends to some corporations, created by public laws, for a limited or particular purpose, as in the case of a school district ; yet the principle cannot be extended to the political corporations, created by our public statutes, principally for public purposes, and not for the special benefit of the members of the same. Towns are corporations of this nature. Their corporate powers are given by public statutes, and are of public notoriety. Their corporate existence or powers are not derived from their charter, which is rather a grant of land than a charter of incorporation, the grantees of which, and who are owners of the soil, may be wholly different from the persons who are inhabitants of the town. The persons residing within the territorial limits of a town are made members, not on their petition or request, but without their consent ; and are required to perform duties for the benefit of the whole public, such as making and repairing roads, building bridges, and taking care of the poor, within their territorial limits. As a branch of the government, and as a corporation or institution, created for public and political objects, not by a charter, but by a public and general statute ; courts must take notice of their existence, and recognize their powers and privileges. It is not, therefore, necessary to set forth in a plea, either their existence, or their authority as a town. The liability of the plaintiff is sufficiently stated in the plea, where it is asserted,

CHITTENDEN, *that he was an inhabitant of the town, having taxable property and a list therein ; that a rate-bill was made out, and he assessed in the sum therein mentioned. His liability to pay a tax, lawfully voted and assessed, was an inference of law from these facts there stated.*
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But although these corporations are public, and their powers set forth in the statutes, yet the acts and votes of the corporation are not so ; and it is more doubtful, whether it was not necessary for the defendant, in his plea of justification, under a vote of the town laying a tax, to state for what purpose it was granted or voted. This presents a more formidable objection to the plea.

There is no doubt, that if the tax is illegal for want of power in the town to vote it, as if voted for a purpose wholly foreign to the objects for which towns are created corporations, the vote would afford no justification to the officer collecting the tax. The statute contemplates this, by providing a remedy for the collector against the town, when he is made liable on account of the illegality in granting a tax. Neither can there be any doubt, that if a tax is voted for any purpose, other than those for which towns are empowered by law to vote and assess a tax, a collector could not justify taking either the property or body of an individual, under a rate-bill, and by virtue of a warrant to collect the same. The only question on this part of the plea is, whether it was necessary for the defendant to allege the purpose for which the tax was voted ; or whether the plaintiff should, in his replication, have set forth the purpose, if he claims that the tax was illegal, as having been voted for a purpose not authorized. It is a question, which, in practice, will not be of much importance ; as wherever it is made, it will generally be between members of the same corporation, or those liable to pay taxes in the town. The principal importance attached to it arises from this, that whichever party has to make the allegation must take the burthen of proof ; and we are not insensible, that, taking either view of the case, imposing either upon the one or the other the burthen of proof, may subject them to some inconvenience and hardship ; as it may, in some cases, be attended with difficulty, to ascertain the precise purpose for which a tax was voted. In another view, it would seem not to have so much importance attached to it ; as the towns must always indemnify the collector against any damage he may sustain, where a recovery is had against him, on account of the want of power to lay the tax, or any illegality in granting the same. The same individual who recovers against the collector, in such a case, will generally

have to contribute his rateable proportion of a tax for the purpose of indemnifying the collector. Taking into consideration, that all these taxes are to be laid for public purposes; that they are voted by the persons who have to pay the same; that the controversy is usually between inhabitants of the same town; we think it not unwarrantable, to make a presumption in favor of the legality of the proceedings of a town in voting a tax, until the contrary is made to appear; and to cast the burden of proving its illegality on the person contesting the same, if the tax was voted at a legal meeting of the inhabitants, in pursuance of a previous warning. It has been decided, that a proprietors' meeting must be taken, *prima facie*, to have been legally warned, if the records of the meeting state that it was legally warned and holden, &c.—*Britton vs. Lawrence and Clark*, 1 D. Chip. Rep. 103. And it would clearly come within the principles of that decision, to say, that a tax voted at a town meeting, legally warned, must be deemed, *prima facie*, to be a legal tax. A very strong authority for this presumption may be found in the case of *Clark vs. The Inspectors of Gas Light and Coal Company*, 4 Barn. and Adolph. 315. It is to be observed, also, that the purposes for which towns are authorized to vote a tax are very general and extensive, they may vote to raise such sums as they judge necessary, for the maintenance of the poor, for laying out, making and repairing highways, for building and repairing bridges, and for *all necessary and incidental charges*, in said town. They are also empowered to prosecute and defend their common rights and interests, and if they may vote a tax, designating the purpose in terms as general as those mentioned in the statute, their powers in this respect are very extensive. Towns having this extensive and general power of taxation, the taxes being voted by those who pay the same; it is considered, that wherever the inhabitants, at a meeting legally warned, vote a tax, it is to be intended, *prima facie*, that it was for a purpose for which they may legitimately raise money by tax. It will follow, that it will be sufficient for any person justifying under a tax laid by a town, to state, that it was voted at a legal meeting of the town, duly warned; leaving those, who contest its validity, to specify the particulars wherein it is illegal or invalid. This plea, therefore, is liable to no objection on account of not setting forth the purposes for which the tax was voted; nor was it necessary to state that it was a legal tax, as contended; the presumption and intendment being as we have already considered.

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There are, however, other defects in this plea, which are fatal to it; probably arising from inattention or carelessness in the pleader. It is no where alleged, that any rate-bill, or warrant for collecting the tax, was ever delivered to the defendant; although it is stated, they were regularly made out and issued. Nor is it alleged, that, by virtue of any such warrant, or in pursuance of any directions therein contained, the defendant entered upon the land, or distrained the property for which this suit is brought. It is only by an inference, that we can learn that the tax-bill was ever committed to the defendant to collect; and this we find only in that part of the plea, where it is asserted, that he showed the same to the plaintiff.

The want of these allegations is something more than a want of form. They are such defects in substance, that the plea must be adjudged bad. The judgment must therefore be entered, that the plea is insufficient.

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ISAAC HITCHCOCK vs. GERMAIN CLOUTIER.

No particular form of words is necessary to constitute a promissory note.

A contract in the Province of Canada, acknowledged before a notary, does not become a debt of record, so that assumpsit cannot be maintained thereon.

The declaration in this case consisted of five counts.

1. Upon a recognizance taken and acknowledged before two notaries.

2. Upon an agreement to pay £31 4s 0d; equal to \$124 80.

3. Upon a note, dated May 11, 1818, for £31 4s 0d; equal to \$124 80.

4. *Insimul computasset.*

5. Money had and received—goods sold.

Oyer being prayed by the defendant—in support of his declaration, the plaintiff produced the following instrument:

“Before the undersigned, notaries public, residing in the city of Quebec, in the Province of Lower Canada, personally appeared Mr. Germain Cloutier, mariner, who acknowledged to be well and truly indebted unto Mr. Isaac Hitchcock, merchant, present and accepting hereof, that is to say, the sum of thirty-one pounds, four shillings, current money of Quebec, for value received in cash by the said Germain Cloutier, and the balance of an account, with

which the said Germain Cloutier is satisfied; which sum of thirty-one pounds, four shillings, the said Germain Cloutier obliges himself to pay the said Isaac Hitchcock, or to his order or attorney, on his first demand, with interest from the day of the date hereof.

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Done and passed at Quebec, in the office of Archibald Campbell, the eleventh of the month of May, 1818. And the said Isaac Hitchcock has signed with us. The said German Cloutier, being requested to do the same, declared that he did not know how to write.

These presents being duly read,

SIGNED,

I. HITCHCOCK,
his
GERMAIN X CLOUTIER.
mark.

B. FARIBAULT, N. P.

ARCHIBALD CAMPBELL, Not. Pub."

Plea was, first, non-assumpsit and joinder.

2. Non-assumpsit, *infra sex annos*.

3. That cause of action, as specified in either of the counts, did not accrue within six years.

Replication.—"That the plaintiff ought not to be barred, because he says that the said writing, upon which he has declared against the defendant, was executed in the presence of two witnesses, called for that purpose, to wit: in the presence of B. Faribault and Archibald Campbell; and that said Faribault and Campbell, at the time of the execution of said writing, attested the same as witnesses, and then and there personally signed their names as witnesses to the execution of said paper by said defendant."

To this replication there was a general demurrer and joinder.

The county court decided the replication insufficient, and that decision comes here for revision.

Allen and Hill, in support of the demurrer, insisted, 1. That the instrument declared upon was not a promissory note, and that the replication was therefore insufficient.

2. That the notaries before whom the instrument was acknowledged, did not sign as witnesses.

Mr. Adams contra.—If the paper on which plaintiff declares is a note, the suit is not barred.

A note is a written promise for the payment of money.—Bagley on Bills, 1. 3 Kent's Com. 74.

The form of writing is immaterial.—Chitty on Bills, 260—Idem, 37. 3 Kent's Com. 75. *Chadwick vs. Allen*, Str. 706. 8 Mod. 362.

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The paper recites the consideration in the usual form of a note, *for value received*. It contains a direct promise to pay. The promisor *obliges himself to pay* a certain sum in money, *thirty-one pounds*, absolutely, without limitation or condition.

It has still further qualities of a note. It is payable *on demand* and *with interest*; and, as if to put the matter beyond all doubt, it is made payable to the plaintiff, *or his order*. It contains every imaginable particular that any note can contain.

If the paper contains a promise to pay money, it is a note; and whether expressed in the laconic style of *I O U*, or *Good to A. B.*, or in the prolix form of *Chadwick vs. Allen*, it is equally good.

The statute of III and IV Anne was said to be a remedial law, and to be favorably construed.—Raymond, Ch. J., 8 Mod. 362. Courts in Vermont have acted on this principle; for without a liberal construction, our cattle notes, &c. could not be considered as notes.

Our construction of the paper is not opposed by the fact, that it is signed by both parties. It is not a contract, as the phrase is used in common parlance, as there is no undertaking on the part of Hitchcock, nor any right acquired by Cloutier. Why his name is added, is not perceivable, unless it be to show that the note was received in payment of the previous claims. The name of the payee on the face of the note cannot vary the legal effect of the undertaking, any more than his endorsement on the back.

The note is not merged in a security of a higher kind by its execution in the presence of two notaries. In some States, a seal is added to a note, and the effect will be to create a greater lien on the maker's property. That is one object in Canada. Another is the greater facilities of proof, as notarial copies are every where received. But, whatever the intention, or whatever the effect, the contract remains the same. It would be a solecism, that a contract, executed for greater solemnity before a notary, should be merged at the moment of its execution.

If the obligation is merged, the notarial act is judicial, and the plea of the statute of limitations of six years is bad. If not merged, and it is not a note; then, as a contract, the statute would not begin to run until a demand.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The declaration consists of five counts, one of which is on a promissory note, to which there is a plea of the statute of limitations. The replication to this plea was adjudged

insufficient by the county court. The pleadings present this question: whether the instrument declared on was a promissory note. The period of limitation, on notes attested by one or more witnesses, is fixed by the statute at fourteen years from the time the cause of action accrues thereon. The more correct way of presenting this question would have been, for the defendant to have traversed the replication, and objected to the instrument when offered in evidence; as no profert is ever made of an unsealed written instrument, nor is oyer demandable. Inasmuch as no question of this kind has been presented, and the instrument is set forth in the plea, we can as well determine whether it is a promissory note, as we could if the question had been raised in a different manner.

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No precise form of words is necessary to constitute a promissory note. A promise to be accountable, or to be responsible, for a sum of money, absolutely, has been held to be a promissory note.—*Morris vs. Lee*, 1 Stra. 629. In the case of *Chadwick vs. Allen*, 1 Stra. 706, an instrument, in the following words, was held to be a promissory note, within the statute of Anne:

“I do acknowledge, that Sir Andrew Chadwick has delivered me all the bonds and notes, for which £400 was paid him, on account of Col. Synge; and that Sir Andrew delivered me Major Graham’s receipt, and bill on me for £10, which £10 and £15 5s balance, due to Sir Andrew, I am still indebted and do promise to pay.”

In this State, although to constitute a negotiable promissory note, it is necessary that it should be payable in money absolutely, yet we have always treated contracts in the form of promissory notes, whether for the payment of money or of specific articles, or even for the performance of services to a certain amount, as promissory notes, and declared on them as such.—*Brooks vs. Page*, 1 D. Chip. Rep. 340. I believe there never has been a doubt, that such contracts, if attested by one or more witnesses, were embraced in the section of the statute of limitations before referred to, which extends the time of limitation to actions on promissory notes attested, to the period of fourteen years.

On an examination of the contract in question, as stated in the papers before us, the instrument purports to be for the consideration usual in promissory notes, “value received.” It is a direct promise to pay: “which sum, &c. the said Germain Cloutier obliges himself to pay to the said Isaac Hitchcock, or to his order, on his first demand, with interest from the date hereof.” It is signed by the said Germain Cloutier, or he has affixed his mark

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thereto. It appears to have been done in the presence of two persons, who have signed their names in the place where attesting witnesses to instruments usually place their names, and who are averred, in the replication, to have attested the same as witnesses to the execution thereof. The signature of the plaintiff to the instrument can have no effect, either to alter or explain the nature of the instrument; as there is no contract or undertaking on his part, and it is added, probably, conformable to some law or practice in the Province of Canada. We do not know, from any thing which has been presented to us, that a contract of any nature, when acknowledged or recognized before a notary public, in the Province of Canada, is merged in a security of a higher nature, or becomes a debt of record. This acknowledgment may afford greater facilities of proving the instrument, or it may create some lien on the estate of the debtor; but I apprehend, that a suit on this contract, in the common law courts of that country, must be, as here, an action of assumpsit.

We are satisfied, that the instrument in question can be considered only as a promissory note; and as the replication alleges, that it was attested by two or more witnesses, it afforded a sufficient answer to the plea of the statute of limitations. Whether the plaintiff can make proof of the instrument without producing it on the trial, is not a question now before us. The judgment of the county court must be reversed, and judgment entered, that the replication is sufficient; and as there has been no trial had on the general issue joined to the country, the cause must be remanded to the county court for the trial of that issue.

LORIN STOW vs. SAFFORD STEVENS.

CHITTENDEN,
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1836.

Where a party binds himself to execute a good and valid deed of land, with the usual covenants, he is obliged to give a deed which conveys a good and sufficient title.

When an obligor binds himself, upon the payment of money and the execution of notes, at a certain time, to convey land by a good and valid deed, and previously conveys the same to another; the obligee must, in assigning a breach, aver his readiness to pay the money and execute the notes, although he need not tender a performance.

In such case, where money was paid at the time the bond was executed under seal, the obligee is at liberty to regard the act of the obligor, in deeding the land to a stranger, as a rescinding of the contract, and may resort to the common counts for his remedy.

This was an action of debt, on a bond under seal. The declaration included the common count for money had and received. A full statement of the pleadings and facts in the case is incorporated into the opinion of the court.

C. Adams for defendant.—1. The payment of the money and the execution of the notes was a condition precedent to the execution and delivery of the notes. It is true, both acts were to be done and performed at the same time; but from the peculiar phraseology of the condition of the bond, the money was to be paid and notes delivered *first*. The expression is, “if after the payment, &c. Stevens shall,” &c.; and from a fair construction, Stevens would be entitled to a time after the payment sufficient to make out the deed.—*Thorpe vs. Thorpe*, 1 Salk. 171.

2. The condition of the bond would be satisfied by the execution and delivery of *a deed*, whether the deed conveyed the title or not. The condition is not that the defendant should convey a good title; for it is evident, that plaintiff relied for his security as to the title upon the covenants which it was stipulated the deed should contain. To test the correctness of this, let us suppose the plaintiff had paid the money, &c., and that defendant, without having deeded to Hawkins, had made his deed and offered it; could plaintiff have refused the deed, because, in truth and in fact, the defendant's title was defective? Certainly not.

3. The excuse offered by plaintiff, for his neglect to pay the money and execute the notes, is not a valid excuse. This is evident, if we are correct in our previous propositions. But it may be further remarked, that for aught that appears, as indeed is the fact, Stevens remained in the possession of the land, and could have given the plaintiff absolute seizure. Besides, although the deed to Hawkins may have been absolute on the face of it, it may have been a trust-deed, for the very purpose of enabling Stevens to secure it for the plaintiff; or it may have been to secure Hawkins

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for money or other things, and Stevens held the defeasance in his pocket, and could have discharged the land by the very money to be paid by the plaintiff. It may be further remarked, that, let the character of the deed to Hawkins be what it will, if after Stevens should have executed his deed to plaintiff, he had re-purchased the title of Hawkins, the title would have enured for the benefit of plaintiff, and the covenants in the deed would have been healed.

Had it been the intention of the parties to bind Stevens to convey a good title, it would have been explicitly stated; but instead of that, defendant is to execute a deed with covenants, and plaintiff relies for his title upon those covenants. There is not one word in the conditions indicating that defendant was to convey a good title. He might be holden on his covenants in the deed, if his title proved bad; but the condition in the bond is not broken because of a defective title. It would be a novel issue growing out of the condition of a bond, that defendant's title was not perfect. Stevens' title may have been, in fact, imperfect at the time of his deed to plaintiff, as possession for fourteen years. But if plaintiff had accepted the deed, and entered upon the land, and Stevens had protected him in that possession, until his title became perfect by the statute of limitations, the covenants would have been healed. The expression, *a good and valid deed*, relates only to the form of the deed, and the manner of its execution, and has no relation to the title of the land.—1 Saund. 320. 5 Mass. Rep. 494, *Aiken vs. Sanford*.

4. But if, as plaintiff contends, they were mutual covenants, to be performed at the same time, plaintiff must have been ready to perform his part; and if he had not been ready, he could not recover of the defendant, even if defendant was not ready, or had refused.

5. It must be averred in declaration, that plaintiff was ready; and without such averment, the first fault is on his part, and he cannot recover.—Chitty on B., 317. *Morton vs. Lamb*, 7 T. Rep. 125. *Rawson vs. John*, 1 East. 203. *Archbishop Canterbury vs. Willis*, 1 Salk, 172.

Hyde and Peck for plaintiff.—As the plea in this case is mere matter of form, containing nothing traversable, the question is, whether a sufficient breach is assigned. As to the construction of the instrument, it is not conceived to be material, whether the stipulations of the parties are concurrent acts, or whether that on the part of the plaintiff is considered a condition precedent; but if it

be material, it is evident that they are concurrent acts, to be performed at the same time. Modern cases show, that the courts have taken a common sense view of the subject, and adopted the intention of the parties as the criterion, to the exclusion of all technical niceties, arising from particular words, found in some of the older cases. Two things to be done on the same day are taken to be done at the same time, and are concurrent acts.—Saund. Rep. 320, n. 4. 11 Pick. 151, *Howland vs. Leach*. 11 John. Rep. 525, *Judson vs. —*.

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As the defendant is to deliver the deed on the payment, the intention is clear; and although the word *after* is subsequently used in the same sentence, it cannot control the construction. If there is any ambiguity, it is to be taken against the defendant. The case of *Judson vs. —* is stronger than the present. The plaintiff was to execute a deed after payment, yet held that payment was not a condition precedent. But as it is expressly stipulated, that both acts are to be done on the same day, it cannot be supposed the intention of the parties was, that the plaintiff should give the defendant a further credit, and rely upon his bond; especially, as the sum to be paid greatly exceeded the penalty.

The covenant to "execute and deliver a good and valid deed, with the usual covenants of seizin and warranty," is a covenant to convey a good title. The plaintiff was not bound to accept a mere formal deed, which conveyed no color of title, and the covenants of which would be broken on giving the deed. A compliance with the words of a covenant is not sufficient, unless it appear to be according to the intent.—Teat's case, Cro. Reports, 7. Skin. 39, *Chute vs. Robinson*. 2 John. Rep. 595—613, *Judson vs. —*. 11 John. 525, *Deorth vs. Williamson et al.* 2 Sarg. and Rawle, 498, *Porter vs. Noyes*. 2 Greenleaf, 22.

Therefore the defendant, by his conveyance before the day, wholly disabled himself to perform on his part. Or, if the construction be, that the plaintiff contracted for the defendant's title merely, the consequence is the same; as in either case, the defendant had parted with or destroyed the thing contracted for. The case of *Aiken vs. Sandford*, 5 Mass. 494, where the court seem to hold that the words of the covenant apply to the form and execution of the deed, was a mere incumbrance by way of mortgage, and not an absolute want of title; and yet, in that case, the court expressly say, that the grantor must be seized. The conveyance to Hawkins, by Stevens, on the 31st of January, of the same land which was to be by him conveyed to Stow, on 1st April following,

CHITTENDER, was, *ipso facto*, a breach of the contract on the part of Stevens, as it wholly disabled him to perform it.—Co. Lit. 220, 221. 5 Vin. Ab. 221, 224. Shep. Touch. 172, 381, 388. 1 Bulst. 117, *Matterson vs. Jolly*. 1 Vint. 271. *Bradley vs. Osterhand*, 13 John. 404.

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This is a breach for which the plaintiff may maintain an action without showing performance, or a tender of performance, on his part; as the law would not compel him to do a nugatory act, and incur additional trouble and expense, without a possibility of advantage. "*Lex neminem cogit ad vana et inutilia peragenda.*"—Sug. Ven. 165. *Scott vs. Sir Anthony Maine*, Cro. Eliz. 449; upon which error was afterwards brought in King's Bench, and judgment affirmed.—Id. 479. The same case is more fully reported in 5 Co. 21, Sir Anthony Maine's case. So in *Robinson vs. Amps*, T. Ray. 25, covenant that if the plaintiff pay a certain sum, 24th June, 1660, then the defendant shall deliver up a certain recognizance to be cancelled, &c.—breach assigned, that the defendant, 21st Oct. 1659, prosecuted an extent on the recognizance. Breach held to be well assigned. *Griffith vs. Leadhurst*, T. Ray. 464. *Rayna vs. Alexander*, Yel. 76, Metcalf's Ed., note to the above case, and the cases there cited. The most of these cases are noticed and approved by the court in the case of *Hopkins vs. Young*, 11 Mass. Rep. 302, which is also an authority in point. *Knight vs. Crockford*, 1 Esp. cas. 189. *Seward vs. Willock*, 5 E. 198. Arch. Pl. 168. *Bewell vs. Parsons*, 10 E. 359. *Newcomb vs. Bracket*, 16 Mass. Rep. 161. This doctrine is consistent with the rule of pleading on this subject. The rule is, where performance by the defendant depends on something executory, the plaintiff must aver performance, or some excuse for non-performance.—Chit. Pl. 310, 324. The question in this case is not, what amounts to a performance, but what is an excuse for non-performance. Any act of the defendant, which disables the plaintiff to perform, excuses the plaintiff even from an offer to perform. Is not the reason the same, where the defendant disables *himself* to perform? So the defendant neglects to do the first act, where it is incumbent on him to perform it.—*Hotham vs. East India Co.* 1 T. Rep. 638. *West vs. Emmons*, 5 John. 179. So where the defendant discharges the plaintiff, by declaring his intention not to perform on his part.—*Jones vs. Burkley*, Doug. 684. The same where the defendant refuses to perform on his part.—*Rawson et al. vs. John*, 1 E. 203. What more unequivocal declaration of such intent, or more absolute refusal, can be

conceived, than an act of the defendant which disables him to perform and destroys the thing contracted for. These cases show that the party is excused at the very point where it appears his act would be nugatory. Upon the same principle, in this case, a readiness need not be averred; for if by readiness is implied a willingness, it is not traversable; but if it implies a *preparation* and *ability*, the plaintiff would be held to the proof, and consequently bound to be in a state of preparation on the day, and thus to do a nugatory act, which Lord Kenyon says, in the case of *Rawson et al. vs. Johnson*, would be repugnant to common sense. Suppose, instead of money and notes, it had been wood, hay, lumber, or some other ponderous article; would the plaintiff be bound to transport and deliver it? If not, why should he be bound to provide himself with the property?—*Corblyan vs. Lansing*, 2 Caine's Cases, 213.

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The distinction is between a contract for a thing in *specie*, and a thing in *kind*. Where the defendant contracts to deliver a specific and determinate thing, the plaintiff thereby acquires an interest in the thing itself, and such an interest as a court of equity—and in those States where they have no court of equity, a court of law—will protect by enforcing a specific performance; and any act of the defendant, by which that interest is impaired, or the thing itself destroyed, is a breach of the very essence of the contract, wholly disables the defendant to perform, and renders any act on the part of the plaintiff entirely nugatory, as no other thing of the kind will satisfy the contract.

But where the contract is to deliver something in *kind*, dependent on some act of the plaintiff, a neglect on the part of the defendant to perform, or to put himself in readiness, is not such a breach as the plaintiff can maintain an action upon, unless he is prepared to show at least a readiness on his part. *The cases on which this rule of pleading is founded, and where this averment has been held necessary, are all cases where the contract was for a thing in kind, or cases where the defendant had done no act to disable himself to deliver the specific thing which formed the object of the contract.* See cases cited on this subject by Chitty, Gould, Archibald, Bacon and Williams, and note to case of *Portage vs. Cole*, Saund. Rep. 320. This distinction is fairly deducible from the cases, sustains the rule of pleading, and reconciles all the authorities on this subject.

The plaintiff has a right to consider the contract rescinded, and recover for money had and received.—*Farrar vs. Nightingale*, 2

CHITTENDEN. *Esp.* 639. *Giles et al. vs. Edwards*, 7 T. Rep. 181. *Johnson vs. Johnson*, 3 Bos. and Pul. 162.

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There being a written contract, under seal, can make no difference, as the bond is for a deed, and not for the repayment of the money ; especially if the plaintiff cannot recover on the bond without paying the residue of the price and delivering the notes. Had the notes been delivered, the non-delivery of the bond would be a good defence in an action on the notes. So the want of title would be a good defence, had the deed been delivered, and the party would not be remitted back to the covenants of the deed, especially as he did not take possession under the deed or contract. *Frisbee vs. Haffnagh*, 11 John. Rep. 50. *Greenleaf vs. Cook*, 2 Whea. Rep. 13. On the same principle, the party may recover back what he has already paid under the contract. ——— vs. *Meecham*, 1 Dal. 428. *Weaver vs. Bently*, 1 Car. Rep. 47.

The opinion of the court was delivered by

MATTOCKS, J.—This was an action of debt, demanding \$1,200 in several counts, declaring on a penal bond, dated August 11, 1822, for \$200,00 ; also in general counts in debt, for money lent and goods sold and delivered. To these latter counts defendant pleaded *nil debit*, and the plaintiff joined. To the former the defendant prayed oyer of the condition of the bond, which was, “that on the payment of the sum of \$100,00, in current money, by the said Loren to the said Stevens, and also on the execution of two promissory notes, by the said Loren to the said Stevens, for \$105,00 each, one payable in one year and the other in two years from the date, with interest, on the first day of April next, (1833) if the said Stevens shall execute and deliver to the said Loren, on the said first day of April next, after the payment of said sum of \$100, and the execution and delivery of said promissory notes by the said Loren to the said Stevens, a good and valid deed, with the usual covenants of seizin and warranty,” of certain lands, then the bond to be void, otherwise in force. The defendant then pleaded in bar, that the plaintiff did not, on the first day of April, 1833, pay said \$100, nor execute said two promissory notes of \$105 each, although thereto requested by defendant ; and that he the defendant was ready and willing to have executed a deed according to the condition of the bond, if the plaintiff had performed on his part. To which plea the plaintiff replied, protesting that the defendant did not request the plaintiff to pay the money and execute the notes, and that the defendant was not ready to execute and

deliver a good and valid deed ; that at the time of executing the bond declared upon, the defendant was well seized of the lands in question, and had lawful authority to sell and convey the same ; yet afterwards, and before the first of April, 1833, to wit, on the 31st of January, 1833, the defendant sold and conveyed the same lands to one Alfred Hawkins ; and the defendant has never since had any right or title to said land, and whereby he had disabled himself from performing the condition of said bond ; “for which reason the said Stone did not, on the said first day of April, 1833, pay to the said Stevens the sum of \$100, and execute and deliver to the said Stevens the said two promissory notes, but neglected so to do, as he lawfully might, for the cause aforesaid ;” and averring, that the defendant has never executed to the plaintiff any deed of said lands, and so has broken his covenant. To which replication the defendant demurred, and the county court adjudged that the replication was insufficient. On the trial of the issue in fact, under the plea of *nil debit*, the plaintiff offered to show in evidence, that at the time the bond in the declaration mentioned was executed, the plaintiff paid to the defendant, in personal property and money, about \$125, as a part of the price of the lands ; and that the remainder of the purchase-money was to be paid at the time and in the manner mentioned in the condition of said bond. The plaintiff offered also to show all the facts set forth in his replication ; and this evidence being objected to by the defendant, was rejected by the court, and judgment passed for the defendant ; and whether these decisions were correct, are the questions submitted.

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As to the sufficiency of the replication, the condition of the bond no doubt requires the money to be paid and the notes given before the plaintiff is entitled to the deed ; that is, the defendant is not bound to part with his land until he has his money and his security ; but whether the plaintiff was bound actually to hand over without a deed being given simultaneously, is not now in question, as this part of the case must be decided upon the validity of the plaintiff's excuse for not performing on his part ; for unless this is valid, there is evidently no breach of the condition alleged. The defendant's counsel contends, that the expression, “a good and valid deed, with the usual covenants,” relates only to the form of the deed and the manner of its execution, and not to the title of the land ; and relies on 1 Saun. 320, and *Aiken vs. Sanford*, 5 Mass. Rep. 494. There is nothing in Saunders, nor in the notes, to this point. In *Aiken vs. Sanford*, which was debt on a penal bond, conditional to sell and convey to plaintiff certain lands in a

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reasonable time, after the payment of a certain sum of money, on the defendant's showing that he had tendered a deed, it was objected that when the deed was offered the land was subject to a mortgage, although it was paid off before action was brought; and the court say, "that the validity of this objection depends upon the condition which required a conveyance of the land by a good and sufficient deed of warranty. The import of these words is confined to the form of the deed and its execution, and not to the title. If the deed was of a proper form, and regularly executed, and the grantor was seized, so that the land was conveyed by it, the condition in this case was performed." But they also observed, that they did not mean to determine, that in no case these words should be considered as applying to the title. If the money was to be paid on receiving the deed, it might be a reasonable construction, that a good and sufficient title should be conveyed; otherwise, the purchaser might part with his money, not merely for the land, but for a lawsuit also. This *per curiam* opinion seems upon the whole to make for the plaintiff; for here the plaintiff, when he contracted to convey, was seized; but by his own act he had become disseized before the day of performance, and his deed would not have conveyed the land; and the deed, besides, was to have been given the same day, although after the payment of the money, which is not giving credit or time for the deed after the payment.

Among the cases cited by the plaintiff's counsel is Teat's case, in Cro. Eliz. p. 7. It consists of twelve lines of black letter, and is worth transcribing, not only because it is pithy and appropos, but to remind the profession that to say all that is needful in few words is among the lost arts. "Debt upon an obligation: the condition of the obligation was, that if the obligor deliver to the plaintiff an obligation, in which he was obliged to the defendant before such a day, then, &c. The defendant sueth the plaintiff upon that obligation and recovereth, and afterward, and before the day, he delivereth the obligation to him. The question was, if this were a performance of the condition. Wray and the other justices held that it was not. Although the words were performed, yet the intent was not performed; for the intent was, he should have the obligation for his discharge, which is not by the delivery of it at the day, for it is transferred in *rem judicatum*; and notwithstanding the delivery of the bond, yet he may have benefit of the judgment." This was a point blank decision, before circumlocution became professional, that performance to the letter was not performance to the sense. And may the countermarch of mind

bring posterity back to such, unsophisticated decisions and to such clearness in reporting; and then to gain a cause, it will not be necessary to "carry three camel loads of books before the Prætor."

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Chute vs. Robinson, 2 John. 613, and *Judson vs. Wass*, 11 John. 525, show that a deed with covenant of warranty means a deed which carries the title with it. In *Porter vs. Noyes*, 2 Green. 22, it is decided that a contract to make a warrantee deed, free and clear of all incumbrances, is not satisfied, unless the grantor had the absolute title. In *Gastrey vs. Perrin*, 16 John. 267, it was indeed ruled, that a good and sufficient deed means only a deed to convey what title the grantor had. This last case even would be sufficient for this point in the cause, as the defendant had good title before he conveyed to Hawkins. Indeed it would seem to be trifling with the good sense of the law to hold that a warrantee deed means a deed that the grantor knows conveys nothing; and it would be giving judicial countenance to fraud, to rule that a man may discharge a legal obligation by giving a second deed of land that has already passed to another by the first. This bond, therefore, required a deed that should convey the land.

But it is further objected, that the replication which assigns the breach should have averred a readiness in the plaintiff to pay the money and execute the notes. In 1 Chit. Plead. 317, it is said, "on averring an excuse of performance by the plaintiff, he must state his readiness to perform the act and the particular circumstances that constitute such excuse." There can be no doubt that the giving the deed, and the paying the money, and executing the notes, were to be concurrent acts, since the absurdity of some old decisions on this subject was fully exploded in *Goodnow vs. Nims*, 4 T. Rep. 761, and that a party could not be forced to part with his money without at the same time having his deed; and that, therefore, after defendant had conveyed the land to another, the plaintiff was not bound to make a tender of the money or notes, upon the same principle that the plaintiff, in an action on a promise to marry on request, when the contract has been violated by the defendant's having married another, is not bound to aver a request that could not be granted. Yet the forms are, that the plaintiff "hath always from thence continued sole and unmarried, and hath been for and during all the time aforesaid, and still is, ready and willing to marry the defendant."

To prevent the "*still is*" from being a wanton surplusage, it must be taken with the qualification, if it were morally possible, and thus showing a continuance of the original desire, and that the

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contract was not rescinded by mutual consent. So in the case at bar, the allegation against the defendant is, that he by selling the land deprived himself of the power to perform, which is equal to a refusal; and if the plaintiff was ready and willing on his part, the bond was forfeit. But if the plaintiff was neither ready nor willing, that is, was not able and did not wish to pay for the land, then it would have been no benefit to the plaintiff for the defendant to have kept it. There was no damage to him by the sale. It is true that in Sir Anthony Manpres' case, reported in Cro. Eliz. 479, and in Coke's Abridgement, 138, it was resolved, "that if a man seized of lands in fee covenant to enfeoff J. S. upon request, and after, he maketh a feoffment of the same to a stranger, in this case J. S. may have an action of covenant without request;" and the same report in Coke even says, "that when the enfeoffment was to be on a particular day, and he that was to enfeoff passes the land to another, the covenant is broken, although he purchase the land again before the day;" and as reported by Croke it is said, that the plaintiff was to make a surrender of his lease, and the defendant to make him a new lease, but the defendant had leased the land to a stranger. "The defendant being disabled to make a lease, the plaintiff needed not *tender* the surrender unto him." But the general principle that is to be gathered from the various authorities seems to be, that where the defendant has disabled himself from performing, the plaintiff, whether the condition or the act which he was to perform was precedent or concurrent, need not perform it, as the law requires no man to do a nugatory act; that is, he need not tender a performance, for that is properly an act, and to do it would require some useless trouble or expense; but to dispense with the averment of being ready and willing, would, we think, be a departure from all the forms, and not authorized by any authority that has been cited or recollected; and as it is not discreet to lessen any more than to enlarge the requirements of good pleading, without strong reasons, which do not exist in this case, as the merits are not involved in this point, we adjudge the replication to be insufficient.

Upon the common counts, the plaintiff claims to recover the money and other property paid in advance towards the land, at the time the bond was executed, on the ground that the act of deeding the lands to a stranger, by the defendant, was at the option of the plaintiff a rescinding of the contract. This is objected to because the contract was under seal, and therefore this claim is merged. But for this, it would be among the common cases of recovering

back the deposit, where the vendor was unable to perfect the title. No authorities have been shown supporting such a distinction, and there seems to be no good reason why the form of the original contract can be of any importance after that contract has been rescinded or abrogated. In *Distrass vs. —*, 1 Dal. 428, it was decided, that money had and received would lie to recover back the consideration, where there was no such land, as described in defendant's deed. In *Weaver vs. Bently*, 1 Cain. R. 47, which was an action of assumpsit to recover back the consideration paid on an agreement under seal, Judge Kent says—"the question will be, whether the defendant having failed to perform on his part, the plaintiff may disaffirm the contract and resort to his assumpsit to recover back what he had paid. We are of opinion, that he had his election either to proceed on the covenant and recover damages for the breach, or to disaffirm the contract and bring assumpsit to recover back what he had paid on a consideration which had failed." Whether the principle should be extended to the mere failure of performance, may admit of doubt ; but in this case, where the defendant has done an unequivocal act of rescinding on his part, and the plaintiff is content so to regard it, and go only for his advances, that being the most favorable for the defendant, we think that the law as well as justice will permit it.

Judgment of county court, as to the demurrer, affirmed ; and as to the issue in fact, reversed.

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TOWN OF CHARLOTTE vs. WEBB and NEWELL.

The court will not, on motion, abate a writ in the name of a town, because it is served by a constable of such town.

A receipt, signed by a collector, for a tax-bill and warrant, is evidence in a suit against such collector and his sureties, on their bond to indemnify the town; and *prima facie* evidence that the rate-bill was regularly made out.

In such suit, an extent issued by the Treasurer of the State against the inhabitants of the town, which has been paid by them, is admissible in evidence, without showing the previous proceedings of the Treasurer.

Where a collector receives a rate-bill for a state tax, signed by one of the selectmen, and promises to procure the signature of the other, the jury may presume that the signature of the other selectman was obtained.

The rule of damages, in a suit against a collector and his sureties, is the amount of the rate bill not paid over agreeable to the warrant.

This was an action brought in the county court upon a bond executed by the defendants to the selectmen of the town of Charlotte, naming them, conditioned as follows:

“The condition of the above obligation is such, that whereas the above named Aaron B. Webb has this day, by the inhabitants of said town of Charlotte, in legal meeting, been duly chosen first constable and collector of town taxes in said town for the year ensuing:—now in case the said Aaron B. shall well and truly execute and discharge the duties of his said offices respectively, and every part thereof, and save the inhabitants of said town, and all others concerned, free from any loss or damage in consequence of any misfortune, malfeasance, or nonfeasance, in the duties of said offices; then this obligation is to be null and void, otherwise to be and remain in full force and virtue.”

The breaches assigned correspond with the pleas in bar.

The first plea of the defendants was in abatement, and states in substance, that the writ was served by Budsey Newell, being an inhabitant of said town of Charlotte, and interested in the suit. To this plea the plaintiffs demurred specially, and assigned the following causes:

1. In the said plea the defendants make full defence, and that a plea of abatement is not good after full defence.
2. There is no prayer of judgment of the said writ.
3. It is not stated in said plea, in what manner nor by whom said writ is served.
4. It is not stated that the said Newell was interested.
5. The said plea is argumentative and uncertain.
6. The defendants, in conclusion, merely pray judgment, that the defendants may be ———.

Joinder by defendants.—The demurrer prevailed.

The next plea was the general issue, and then the following special pleas in bar. CHITTENDEN,
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1. That the inhabitants of Charlotte did not, at their annual March meeting, vote a tax of three cents on the list of the polls and rateable property of the inhabitants of said town, for the purpose of paying town charges and expenses. Charlotte
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2. That neither the select men of said town of Charlotte, nor any person in their behalf, did make out and deliver to the said Aaron B. during the term he was so elected first constable and collector of town taxes of said town of Charlotte, as the plaintiffs in their declaration have alleged, any rate or tax-bill against the inhabitants of said town of Charlotte, assessed on the list of the polls and rateable estate of said town of Charlotte, for the year 1827, or any warrant whatever for the collection of such supposed tax-bill.

3. That neither the selectmen of said town of Charlotte, or any one in their behalf, did during the time the said Aaron B. Webb was so elected constable and collector aforesaid, deliver any tax-bill whatsoever against the inhabitants of said town of Charlotte, for a state tax on said town of two cents and five mills on the dollar, on the list of the polls and rateable estate of the inhabitants of said town of Charlotte, for the year 1828.

Upon these issues a verdict was returned for the plaintiffs, and the cause came here upon the following bill of exceptions.

This was an action of debt on bond, executed by the defendants to the selectmen of the town of Charlotte, conditioned that the said A. B. Webb should faithfully discharge the duties of first constable and collector of taxes for said town.

The plaintiffs, in support of the issue on their part, offered in evidence the bond declared upon; to which the defendants objected, but the objection was overruled and the bond admitted. To which defendants excepted.

The plaintiffs, in further support of the issue on their part, offered in evidence a copy of the proceedings of their town meeting in March, 1828; to which defendants objected. The objection was overruled and the copy admitted. To which defendants excepted.

The plaintiffs, in further support of their issue, offered in evidence a receipt, signed by said Webb, in the words following, viz.

“Received of the selectmen, in the year 1828, a town tax-bill, amounting to four hundred and seventy-five dollars and thirty-two cents, to collect and account for according to law.

Signed, A. B. WEBB, Collector.”

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On the back of said receipt, the following endorsements were made :

“ Received 14th Oct. 1829, by the hand of Lyman, \$20,00. Received, Charlotte, 9th March, 1829, on the within receipt, \$144, 18. Received 13th May, 1829, \$45 50. Received, March 10th, 1831, \$9 81, on an order in the hands of J. D. Farnsworth. Received, May 4th, 1831, \$24 61, endorsed on two orders received by N. Lovely.”

To the admission of this receipt the defendants objected, but the objection was overruled and the receipt admitted. Defendants excepted.

The plaintiffs, in further support of their issue, offered in evidence an extent, issued by the treasurer of the state against the inhabitants of said Charlotte, on the first day of January, A. D. 1831 ; to which the defendants objected, because it did not appear that any extent had previously issued against said constable ; but this objection was overruled and the extent admitted, although the defendants urged further objections to its admission as evidence in the case. It appeared that the extent had been paid by plaintiffs.

The plaintiffs, in further support of their said issue, read in evidence a warrant for the collection of state taxes, issued by the treasurer of the state on the third of November, 1828, directed to A. B. Webb as first constable of said town of Charlotte.

J. D. Farnsworth was then called as a witness by plaintiffs, and testified that he made out a rate-bill for the state tax, certified and signed it, and handed it to A. B. Webb, who said he would procure the names of the other selectmen to it ; but witness did not know that any other selectman signed it. Charles Grant, J. D. Farnsworth, and Nathaniel Newell, were the selectmen of Charlotte in the year 1828. No testimony was adduced tending to prove that Webb had collected any more taxes than what he had paid over and procured endorsed on his receipt.

Here the plaintiffs rested their case.

The defendants then contended, that the plaintiffs, upon their own showing, were not entitled to recover ; and requested the court so to decide, but the court refused.

The defendants, in support of the issue on their part, called J. D. Farnsworth, who testified that he took the receipt before mentioned from the constable for the rate-bill ; that the selectmen made out no rate-bill for the town tax in 1828, and that none was delivered to Webb by the selectmen ; but Webb had a state tax-bill of three cents on the dollar, the amount of the town tax, and he had carried out the amount of the town tax for 1828 in a column of

figures, and that he added it up and found it correct, and certified it, and he had no knowledge that either of the other selectmen ever saw it. He further testified, that at the time he took the receipt aforesaid, he made out a warrant for Webb, for the collection of said tax, but did not procure it signed by a justice of the peace. Webb took it, and said he would procure it signed, but witness did not know whether Webb ever did procure it signed.

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The defendants, in further support of the issue on their part, produced the rate-bill for the state tax, certified by the said J. D. Farnsworth, and having upon it the name of Charles Grant, as one of the selectmen, above the name of the said Joseph D., selectman.

Charles Grant was then called a witness by the defendants, and testified that he did not sign it at the time it was made out, but could not tell when he did sign it—thought he did not sign it until after Nathaniel Newell sued Webb for taking his oxen, which was in 1830. On cross-examination, he said his impression was, he signed the rate-bill before Webb went off, which was proved to be in 1829.

The testimony here closed.

The defendants requested the court to charge the jury as follows:

1. That the plaintiffs cannot recover upon the bond against Webb and his surety, for not collecting and paying over the state tax, unless they prove that a rate-bill was made out by the selectmen for that tax, in due form of law, and certified by a majority of them, as the state tax, and delivered to Webb in due season, so that he could legally collect said tax.

2. That the plaintiffs cannot recover in this action the amount of the town tax of the defendant, unless they prove that the selectmen of said Charlotte, in due season, made out a regular rate-bill of that tax, and that the same was duly certified by a majority of them, and that they procured from a justice of the peace a legal warrant for the collection of said tax, and that they, or some of them, delivered said rate-bill and warrant to the said Webb in due season for collection.

3. That the plaintiffs can only recover nominal damages, unless they prove that the said Webb collected more money on said tax-bills than he paid over; for if Webb did not collect the tax of the inhabitants of said Charlotte, they ought not to recover of him and his bail.

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4. That if the jury find that no rate-bill was made out by the selectmen, and certified by a majority of them, and delivered to the constable, Webb, with a legal warrant authorizing him to collect the town tax, the plaintiff cannot recover. The fact, that Webb himself, from his old state tax bill, made out the amount of the town taxes, and submitted it to J. D. Farnsworth, one of the selectmen, who added it up and found the amount correct, without certifying it as a regular tax-bill, will not entitle the plaintiffs to recover the town tax.

The court refused to charge the jury as requested by the counsel for the defendants, and among other things charged the jury, that the receipt of the constable, acknowledging the receipt of a rate-bill, was, in the absence of proof to the contrary, evidence that it was a legal one, duly certified by the selectmen, according to law; and that the evidence of Grant, as to when he signed it was loose and unsatisfactory. It was not necessary that the selectmen should procure a warrant signed by a justice of the peace, before they handed it over to the constable. The signature of the justice could be procured by the constable at any time; and if the jury find that Webb, the constable, took the warrant before it was signed, with an understanding that he was to procure some justice to sign it, the legal presumption is, that he did procure it signed in season to enable him to collect the tax. As it respects the state tax, the court say, if the jury find that J. D. Farnsworth, one of the selectmen, made a rate-bill and signed it, and delivered it to Webb, the constable, with the understanding that he was to procure the signatures of the other selectmen, the legal presumption is, that he immediately procured the name of Grant, the other selectman, to said rate-bill; and Webb ought not, at this late day, to be allowed to say it was not signed in due season by Grant, the other selectman, without satisfactory proof. And if the jury find that it was signed by Grant, the other selectman, in due season to avail the constable, the plaintiffs are entitled to recover.

To this charge the defendants excepted. The jury returned a verdict for the plaintiff. Exceptions were allowed and certified.

Maeck and Upham for defendants.—On the plea of abatement, the first question is, whether it was good in substance; secondly, whether it was pleaded in good form; thirdly, if not formally well pleaded, whether the court ought, *ex officio*, from the matter before them, in the manner it was made known, to have quashed the writ.

1. The substance of the plea. The town of Charlotte are plaintiffs in the suit. The writ is directed to and service made by a member of the corporation. He was both a party and in interest, and by express provisions of the statute, is prohibited from serving the writ.—Stat. p. 64. The statute is imperative and the law is founded in sound policy.

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The plea then being good in substance, the next inquiry regards its form. We contend the matter is well pleaded. Anciently great strictness was required in pleas of abatement, but the rule in modern times is relaxed, and the certainty formerly required is now dispensed with. The court now puts a common sense construction upon them. The beginning and conclusion of the plea both denote it to be in abatement, and both pray that the plaintiff's writ may be quashed; and the body of the plea assigns the cause with all reasonable certainty. The kind of service made by the officer need not have been set forth, as the objection is to the power of the officer to make any service at all. If he had power to make service in one way and not in another, there would be force in the objection; but having no power, it is immaterial how he attempted to serve the writ. The objection that the defendant makes full defence is of no importance. The "&c." now implies full or half defence, according to the subject matter of the plea.—Gould on Pleading, 31, 32. 8 Term Reports, 633. 2 Saund, 209, c. (n.) Law. Pl. 92.

The plea was good as a motion, and it was the duty of the court to have dismissed the suit on motion, though a parol one. The following authorities fully sustain our position, and, moreover, establish the position, that even if the defendants plead an insufficient plea in abatement, which is overruled on demurrer, still the court will, *ex officio*, dismiss the suit, and are bound to do so.—11 Mass. Rep. 343. *Gage vs. Gaffman*, 11 Mass. Rep. 182. 14 Mass. Rep. 132—5 do. 362. 6 Peck, 271. Story Pl. 24, 25. 5 Conn. Rep. 140. *Essex vs. Holmes*, 6 Vt. Rep. 47. 10 Mass. Rep. 176.

The plaintiff cannot insist, that it could not appear to the court that the officer, who attempted to execute the writ was a party and in interest. The writ was directed to the constable of Charlotte, the service was made by the constable, and if made by any other constable, it was certainly void. The law provides that constables shall be inhabitants and freeholders of their respective towns. The question, whether legal constable or not, cannot be controverted in this case; and the plaintiffs having created him constable, the pre-

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2. The bond was void on the face of it, and ought not to have been admitted as evidence. It was an official bond, and consequently, if the condition contained any thing not authorized by statute, not only such part of the condition is void, but the whole bond.—*Lyon vs. Ide*, 1 D. Chip. Rep. 46.

The statute makes the towns responsible for the neglect or default of the constable.—Stat. p. 420.

The town had no right to take a bond from the constable, with a condition extending further than they can be made liable. The condition of the bond extends further than the one prescribed by statute.—Stat. p. 420. No other person, however much he might suffer by Webb's official conduct, has any remedy against the town, except it was through the neglect or default of Webb. Suppose a constable were to serve process after the return day had expired, or to take property of A on an execution against B, is the town responsible to the defendant in the process in the first instance or to A in the second?

Again: The bond should either have been taken to the town, or to the selectmen by the name of the office, not in the names of the individuals exercising the office.—Stat. 420.

But if the bond may be considered good, taken to the selectmen, in the names of the persons exercising the office, the suit should be in their names. The legal interest resides in them, and the persons beneficially interested cannot sue.—Ham. Par. 11, 33, 313, 314. 10 Mod. 280. 2 Cranch, 308, 302.

There are cases of parol simple contracts, where the person beneficially interested may sue; but never in cases of deeds. Neither can he sue, though the obligee has made an express promise to him. His remedy is of a higher nature, to wit, upon the bond in the name of the obligee.

The addition of "selectmen, &c." does not assist the plaintiff. It is a mere *discriptio personæ*.—6 East. 110. 9 John. 335. 8 Mass. 103.

This action on a bond so executed is not given to the plaintiff by the act of Nov. 6, 1817, Stat. 159. The act contemplates actions founded upon statutes, and where the pleader must necessarily count upon the statute. The right to take the bond is given by the statute, but the action is not founded upon the statute more than action in favor of endorsee against endorser is.

The receipt of the constable was improperly admitted in evi-

dence. If Webb had been sued alone, or they had been both joint principals, the rule might have been different. The admission of the deputy relative to his official acts binds the sheriff, because, say the authorities, he is a mere servant, and the sheriff has his bond to indemnify him. But Newell was only liable on Webb's default. To admit the admission of the principal to charge the surety, is placing the surety entirely in the hands of a dishonest principal, and opens a wide door for collusion between third persons and the principal to destroy the surety. A claim against a surety is always a matter of strict right on the part of the person making it. Equity is on the side of the surety. It has been decided, that the admission of the principal, in a good bond, that he had broken it, is not evidence against the surety.—Swift's Ev. 128. *Phoenix vs. Day*, 5 John. 412. *Abel vs. Torgue*, 1 Root. 502. *Bostwick vs. Lewis*, 1 Day, 33. *State Bank vs. Johns*, 1 Conn. Rep. 404. *Walker vs. Dubeney*, 1 Marshall.

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The treasurer's extent was not admissible, without first laying the foundation for it, by showing that he had previously issued one against the constable, and the sheriff had returned it *non est inventus*.—Stat. 403, 404.

The plaintiff's evidence did not support the issue on the third and fourth pleas in bar, and the charge of the court relative to what evidence would support the issue on the above pleas, was clearly wrong. In the third plea, the issue was, whether the plaintiffs did deliver the warrant and rate-bill they averred they did in their declaration; and on the fourth plea, whether they delivered a rate-bill for the collection of the state tax. The proof was in excuse for not doing it, to wit, that the officer agreed to get them himself. This was not proving the point in issue, and the court ought so to have told the jury.

Again: The court ought to have charged the jury, that the rate-bills should have been signed by all, or at least a majority of the selectmen.—*Townsend vs. Gray*, 1 D. Chip. 127.

The court erred in instructing the jury that Webb got the other selectmen to sign the rate-bills and the warrant. The only ground for the presumption was, that Farnsworth swore he agreed to it. A presumption is an inference from facts proved that other facts do exist, and results from their connection with each other.—Sw. Ev. 136. Here was no ground for the presumption. It might as well be presumed a note was paid when it fell due, because the party had promised to pay it. The fact was capable of positive proof, and in such cases, if the party chooses to rely upon pre-

CHITTENDEN: sumptive proof, he is not entitled to recover.—Swift's Ev. 138.
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 Webb & Newell. The selectmen of 1828 were all examined, and denied signing the bills of 1828, or during the time Webb was elected constable; consequently the contrary could not be presumed.

The charge relative to Grant's testimony was wrong, and misled the jury. Though his testimony was unsatisfactory, as to the precise moment when he signed the bill, it fully appeared by his testimony that he did not sign it until after the year had expired that Webb was elected constable.

The admission of the evidence relative to Webb's agreement to get the warrant and rate-bill signed, and the charge of the court on the several points in reference thereto, were wholly wrong, considering Newell was but a surety. He was only liable in case Webb made default, and being surety, plaintiffs must show a full and literal performance on their part to hold him. The plaintiff's duties are prescribed by law, entered into the contemplation of the parties when the bond was signed, and if by any act of theirs his risk has been increased, he is discharged.

The court ought to have charged the jury to find only nominal damages under the evidence. It did not appear that the rate-bills have ever been collected. They belong to the town, and the town is authorized to collect them. The surety has no such right.

C. Adams contra.—1. As to the plea in abatement.

(1.) Pleas in abatement, as they delay the trial of the merits, are not regarded by courts, and the greatest accuracy and precision are required.—1 Chit. Pl. 443. Law. Pl. 107.

(2.) In this plea defendants have made what is called full defence, and it is a rule in pleading, that defendant cannot plead in abatement after full defence.—1 Chit. 414. 1 Tidd, 560. Law. 92.

(3.) There must be a prayer of judgment.—3 Bl. Com. 303. 1 Chit. 451. Law. 107–9. 2 Saund. 209.

In this case defendants say the writ *ought* to abate, but do not pray judgment of it.

(4.) The interest of the constable is an inference of law, growing out of certain facts, which facts should be stated so that they might be traversed. He was not necessarily interested by being an inhabitant, for he might have no list or rateable property.

(5.) The constable is not necessarily an inhabitant. There is no law requiring it, and from the authority given to towns, *to agree with some suitable person*, it is rather to be inferred that his residence might be immaterial.—Stat 411, sec. 6.

(6.) If the constable was an inhabitant and interested, the facts should have been pleaded in such a way that plaintiffs could have traversed them. But in this case they are not asserted nor alluded to, except argumentatively.

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2. As to the pleas in bar.

(1.) On the first issue of *non est factum*, it is not perceived that any question can arise, the bond being in due form.

(2.) The same remark may be made as to the second issue.

(3.) As to the third issue, we contend that the rate-bill was a *legal bill*. It contained the names of all the inhabitants, with the sums in which they were assessed, with the proper certificate of the selectmen, as the constable received the rate-bill and warrant, and promised to get them signed. But the receipt is conclusive, and defendants are not at liberty to oppose it.

(4.) As to the fourth issue, it appeared by plaintiff's showing, that they delivered Webb the treasurer's warrant for the collection of the tax; that Farnsworth, one of the selectmen made out a rate-bill and certified it; that Webb took it and promised to hand it to the other selectmen to sign; that an extent had been issued against the town, which they paid. On this evidence it is contended that the legal presumption is, that the rate-bill was signed by the other selectmen; that whether signed or not, is of no importance, unless defendants show that some one refused to pay his tax; and in that event, it would be sufficient if plaintiffs procured the other selectmen to sign in time for the collection of the tax.

The showing on the part of the defendant, instead of rebutting the presumption, strongly corroborates it. The rate-bill, when produced had on it the names of Farnsworth and Grant; and the testimony of Grant clearly shows that it was signed in due season to avail Webb.

The court correctly refused the motion for a non-suit, because the plaintiffs have made out their case, and because court will not order a non-suit against will of plaintiff.—*French vs. Smith*, 4 Vt. Rep. 363.

Plaintiff's right to damages is not to be limited to amount collected by constable.

It was not necessary to show the extent issued against the constable. The issuing of the extent is, *quasi*, a judicial act; and in favor of judicial proceedings, it is to be presumed they are founded on proper evidence. The extent against the town is, therefore, of itself, sufficient evidence that an extent had previously issued against the constable.

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The opinion of the court was delivered by

WILLIAMS, Ch. J.—The questions in this case arise both from

the judgment rendered by the county court on the plea in abatement, and the decisions made at the trial of the issues joined to the jury.

The original writ was served by a constable of the town of Charlotte. It is contended for the defendants, that the court, for this cause, should have abated the writ, on motion and without plea. Where there is a want of jurisdiction in the court, or where the writ is itself a nullity, so that a judgment thereon would be incurably erroneous, it would be the duty of the court, on this being shown to them, whether by plea, motion, or otherwise, to dismiss the writ; or, as it is said in some cases, to abate it *ex officio*. The object of the service of a writ is primarily for the purpose of notice to the defendant to appear. He may appear and answer, and by that appearance or answer, waive any advantage which might otherwise have been taken of any irregularity or defect in the service. If he intends to insist upon any advantage, in consequence of an irregular or defective service, he must set forth the irregularity or defect, in a plea framed according to the established rules of pleading. The inhabitants of a town are not considered as the parties to a suit in the name of their town, so far that they can either release or control the suit. They were excluded from being witnesses by the common law, on the score of interest alone. Hence, while a rated inhabitant was excluded as a witness in such suit, an inhabitant not rated was admitted. An inhabitant who has no interest in the event of a suit, for or against the town, may therefore serve a writ to which the town is a party. At all events, the fact that a writ was served by an inhabitant is not of itself sufficient to induce the court, at any stage of the proceedings, to abate or dismiss the suit on motion. The irregularity in the service of the writ in this case was the proper subject of a plea in abatement, and unless the plea can stand the test of a demurrer, the county court rightly awarded a *respondeas ouster*. The plea is obviously defective and informal. It is not directly averred that the constable was interested in the suit, but his interest is only inferred by way of argument, from the fact of his being an inhabitant, and it is not distinctly averred that he was an inhabitant. There is no prayer of judgment, either in the beginning or conclusion of the plea. Indeed, the defects in the plea are so obvious, that it was not much insisted on in the argument that it could be sustained as a regular plea in abatement. There is, therefore, no error in the judgment of the county court on the plea in abatement.

Several questions have been raised on the determinations of the county court, made at the trial. It is argued, that the receipt executed by the collector, Webb, was not admissible in evidence in this suit. We think, however, that these receipts are something more than the mere verbal admissions of a person. They may be considered as the written evidence of a particular fact, intended at the time as the evidence to prove that fact whenever it should come in question. Like receipts for writs or executions, they are designed to supercede the necessity of preserving any other testimony as to the fact of delivery and receiving the rate-bill and warrant, and are proper evidence as well against the collector as against his sureties.—In the case of *Middleton and al. vs. Milton*, 10 Barn. and Cres. 317, an entry made by a deceased collector of taxes in a private book, kept by him for his own convenience, whereby he charged himself with the receipt of money, was held to be evidence of the receipt of the money in an action against his surety, on a bond executed to secure the due payment of the taxes received by the collector.

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It appears that an extent, which had issued against the inhabitants of the town of Charlotte, and which had been paid by them, was admitted in evidence, though objected to by the defendants. This was certainly admissible for several purposes. It was evidence of the amount paid by the plaintiffs, and that the payment was not a voluntary payment. The regularity of the previous proceedings to be taken before issuing the extent could not be questioned by these parties in this suit, but their regularity was to be presumed. An extent is in the nature of a *scire facias*, issued by a public officer. The recital therein was, to these parties, at least *prima facie* evidence that the proceedings were had agreeable thereto.

The evidence as to the two rate-bills, it is contended, was also insufficient, or improperly received, to prove the fact of the delivery of those rate-bills, together with the warrant for the collection of the town tax, to the collector. The receipt executed by the collector, admitted as above mentioned, alone, and certainly when taken in connection with the testimony of Joseph D. Farnsworth, as detailed in the bill of exceptions, was *prima facie* evidence of the regularity of the rate-bill. The object of a rate-bill is only to ascertain the amount, or the particular tax, due from each individual, and this is ascertained by mere calculation. The tax was voted on the list of 1827, and if the collector had any other rate-bill containing the list of that year, this tax could as well be calculated

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and carried into a column of figures against the names of the individuals in that rate-bill, as in any other way. But further: the rate-bill was by the receipt proved to be in the hands of the defendant, Webb. If there was any such irregularity or defect in the rate-bill as would exonerate the defendants, or excuse the collector from collecting the same, he might and should have produced the same in evidence.

The evidence also in relation to the rate-bill for the state tax was entirely satisfactory. On the receipt of the warrant from the state treasurer, it becomes the duty of the select men to make out a rate-bill. Such a rate-bill was made out and signed by one of the selectmen, and delivered to the defendant, Webb, who agreed to procure the signatures of the other selectmen. It was in evidence that it was signed by Mr. Grant, another selectman, although there was some uncertainty as to the time when. But from the rate-bill produced, apparently regular, taken in connection with the testimony, it sufficiently appeared, that the rate-bill was made out in season, or that defendant, Webb, who was collector, was under no embarrassment in the collection of the tax, from the default or neglect of the town or of the officers thereof. The charge of the court to the jury upon this part of the case has been objected to, inasmuch as the judge told the jury, that the legal presumption was, from the facts stated, that the signature of the other selectman, Mr. Grant, was immediately procured to the rate-bill. On this point it may be observed, that, from the evidence in relation to the undertaking of the collector to procure the signature of the other selectman, after he received the rate-bill certified by one of them, it was in a great measure immaterial when he caused the same to be perfected by the signature of the other. But the charge on this point is not liable to the objection raised. The language made use of was not, that this presumption was one which the jury were bound by the rules of law to draw; but was, only, that the legitimate and fair presumption from the facts in evidence was, that this signature was immediately procured. The defendant, Webb, had engaged so to do, and it was to be presumed, that in this particular, when there was nothing to lead to a doubt, he had acted agreeable to his undertaking.

Upon the subject of damages, it is only necessary to observe, that in consequence of the neglect of the collector, the town had been subjected to the payment of the amount of the whole of the state tax, and the town tax had not been fully paid to them. The correct rule of damages was, therefore, the whole amount of the

taxes, or what they had been compelled to pay. The collector CHITTENDEN,
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is empowered yet to collect any arrearages due from individuals. Charlotte
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The object in taking the bond was, to ensure a punctual and faithful performance of the duties required of the collector. The plaintiffs may therefore resort to this bond, and are not under obligation to endeavor to ascertain what remains uncollected, or take any measures to collect from the several individuals, if there are any who have neglected to pay their tax to the collector.

The result of the whole is, that the judgment of the county court must be affirmed.

CASES IN THE SUPREME COURT

FRANKLIN COUNTY.

JANUARY TERM, 1835.

Present, HON. CHARLES K. WILLIAMS, *Chief Justice.*

| | | | |
|---|---|-------------------|------------------------------|
| " | " | SAMUEL S. PHELPS, | } <i>Assistant Justices.</i> |
| " | " | JACOB COLLAMER, | |
| " | " | JOHN MATTOCKS, | |

FRANKLIN,
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STATE TREASURER vs. TIMOTHY FOSTER.

Scire facias on a judgment, to procure execution against the party to said judgment, is not an original suit, but a continuation of the former action.

The execution thereby procured is an execution on the former judgment.

This was a *scire facias* against the defendant, as the bail of Shiverie Holmes, sheriff of the county of Franklin in the year 1821. The declaration, after setting out the appointment of said Holmes in 1820, and the entering into the bond of recognizance by the defendant, in common form, proceeded to allege the recovery of a judgment in favor of the plaintiff, the issue of execution thereon, the delivery thereof to said Holmes, and his neglect thereon, in 1821. It then alleged the commencement of an action and recovery of a judgment, by the plaintiff, against said Holmes, for said neglect in 1821. It further alleged, the said judgment remaining unsatisfied, the plaintiff, in 1826, sued out a *scire facias* against said Holmes, and procured execution thereon in 1832, which was duly issued, and legal return had thereon, of *non est inventus* and *nulla bona*; and then calls on the defendant to show cause why execution therefor should not issue against him. To this there was a general demurrer and joinder.

Hunt and Beardsley for the defendant.—1. The defendant insists, this action cannot be maintained. The judgment which the plaintiff seeks to enforce by this action is not a judgment rendered for the neglect of the sheriff. The execution which issued on that judgment was not *non ested*, but suffered to run out.

2. The *scire facias* brought against Holmes, as set forth in the declaration, had no other effect than an action of debt, brought on the same judgment.

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The State's Attorney for the plaintiff.

The opinion of the court was delivered by

COLLAMER, J.—The statute provides, where a judgment has been obtained against a sheriff for a default or neglect of official duty, and an execution issued thereon, on which there is a return of *non est inventus*, or a commitment to prison, then a *scire facias* may be sustained against the bail of the sheriff. It is on that statute this action is founded; and inasmuch as it appears by the declaration, that after the judgment was obtained against the sheriff, it lay unexecuted several years, and then a *scire facias* was sued out thereon against said sheriff, execution issued, on which there was a return of *non est inventus*; the question now is, was there an execution issued on the judgment against the sheriff for neglect, or did it issue on a different and independent judgment. In other words, was the *scire facias* against Holmes an independent or separate action, or is it but a continuation and part of the former suit?

Scire facias is a generic term, and includes proceedings of two distinct classes. First, those cases which are in nature and in fact original actions, such as *sci. fa.* to set aside letters patent, on recognizances of various kinds and these cases in our statute, against sheriff's bail, &c. Secondly, *sci. fa.* on a judgment against parties, or previous thereto. These are not original suits, but merely ancillary. It is used when there is a death between interlocutory and final judgment, or a marriage has intervened. Such are clearly but parts of the former suit. In 1 T. R. 383, where *scire facias* was brought because the defendant died between the execution and return of the writ of inquiry, the court say, "this is not a new action, but a continuation of the old one."

Under which of these classes belongs the *scire facias* on a judgment, after a year, against the judgment debtor? By the ancient common law, *sci. fa.* could not issue on judgment in a personal action. It was always debt. In real actions, *sci. fa.* issued, because debt could not be sustained for the land, in kind. By stat. West. 2, (13 Edw. 1,) *sci. fa.* was extended to personal actions; and as thus anciently modified, the law has come down to us. The law presumes the judgment is in some way arranged in a year, and will not suffer an execution to go. *Sci. fa.* is issued

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for the debtor to show cause why execution should not issue; and and if no cause is shown, judgment passes that the plaintiff have execution. In short, it is but a process to procure execution *on the former judgment*.

“When brought to revive a judgment, after a year and a day, it is but *a continuation of the original action*.”—2 Arch. Pra. 76.

“Upon a recognizance, a *scire facias* is an original proceeding; but upon a judgment, it is only *a continuation of the former suit*.” Tidd. Prac. 983.

The result is, that execution did issue on the judgment against Holmes for his neglect.

Judgment, that the declaration is sufficient.

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SAMUEL BARLOW vs. AARON BELLAMY.

An unqualified acknowledgment, that a debt is due, is conclusive evidence of a new promise, and takes a case out of the *statute of limitation*.

This was an action of assumpsit on three notes of hand, dated June, 1817. Plea, the statute of limitation. Replication, a promise within six years, and issue joined to the country. On trial, the plaintiff proved, that one S. H. Barlow, as his agent, called on the defendant with the notes, February 28, 1828, at Shelburne, and there showed him the notes, and talked with the defendant about them. The defendant then said, that he gave the notes, that they were due, and he meant to have seen the plaintiff about them before. This was all the evidence in the case. The defendant insisted, that the plaintiff could not recover, but the court decided that these declarations of the defendant were evidence of a new promise, and directed a verdict for the plaintiff. To which the defendant excepted, and thereon the cause passed to this court.

Smalley and Adams for the defendant.—The question in this case is, whether the admission of the defendant, that he gave the notes, and that they were due, and he meant to have seen the plaintiff about them before, is sufficient to revive the notes. According to many of the ancient decisions on the statute, this evidence would undoubtedly be sufficient. But the result of the modern adjudications is, that in order to recover on the strength of a new promise, an express promise to pay, or an acknowledgment

of a subsisting debt, which the party acknowledging expresses a willingness to pay, must be proved.—*Bell vs. Robinson*, 1 Pet. Rep. 351, 362. Wilk. on Lim. 63, 33, and authorities there cited. L. L. No. 2. *Tanner vs. Smart*, 13 C. L. R. 273. *Hancock vs. Bliss*, 7 Wend. 267.

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No case has been adjudged in this court, where it has been held that an admission of the character of the defendant's at bar would be sufficient proof of a new promise. The admission in this case is no more a promise to pay the notes than the plea in bar. And upon what principle are the court to deprive the defendant of the benefit of the statute, because he did not plead it but in part before he was brought into court?—*Wilkinson, ube supra, Whippy et al. vs. Hillary*, 24 C. L. R. 283. *Gibson vs. Baghott*, 24 C. L. R. 283, in note.

If the defendant had accompanied his admission with a declaration that he should rely upon the statute to defeat the demand, it is well settled that the admission would not be evidence sufficient to sanction the action. But what kind of ground for an obligation is that, which one may concede, and yet disarm the law of ability to enforce?

Hunt and Beardsley for the plaintiff.—The only question presented by this bill of exceptions is, whether the acknowledgment made by the defendant is legally sufficient to remove the statute bar.

The words used by the defendant, when called on for payment, were, "that he gave the notes, that they were due, and that he meant to have seen the plaintiff about them before." These words, we insist, amount to a sufficient acknowledgment to remove the bar and revive the original action. In *Olcott vs. Scales*, 3 Vt. Rep. 173, the court directly recognize the doctrine, that an acknowledgment of a debt, in terms which admit it to be due, removes the effect of the statute of limitations. The same doctrine is recognized in *Bell vs. Morrison*, 1 Pet. Rep. 368. *Clementson vs. Williams*, 8 Cranch, 72, and numerous other authorities, both in England and our sister states. Indeed, we think it may be safely averred, that no case can be found, where an unequivocal, unconditional acknowledgment of a present indebtedness, or a subsisting liability, has not been held sufficient to remove the bar created by the statute.

The opinion of the court was delivered by

COLLAMER, J.—The only question presented is, does an unqualified acknowledgment that a debt is due take it out of the statute

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of limitation? It is too late now to inquire whether the statute is to be holden an absolute bar both of the debt and the remedy, except in the cases therein excepted; or whether it rests on a presumption of payment, which, when rebutted, dispenses with the statute. Whether the statute confers on the debtor a personal privilege, which he alone may waive by confessing the debt, or by neglecting to plead the statute when sued; whether the statute was made for debts which had been paid, or for those which never were paid; whether, in case of a new promise, the former debt, barred by express law, is revived, or only a foundation laid for an action on the new express promise, of which the old debt constitutes the consideration of moral obligation:—all these, if *res integra*, would constitute grave questions, redolent of discussion. But they are too far settled by decision for any court, not utterly regardless of the course of safe precedent, now to adventure upon. While we repudiate those decisions which wrest a man's words and actions and even silence, to put into his mouth concessions and promises which he never made; we at the same time consider it fully and repeatedly decided in this state, and sustained by authority, that an unqualified concession of an existing debt takes it out of the statute. In this case, the defendant, within six years before the commencement of this suit, and after the statute had run on his notes, conceded that he made the notes, and that they were due. This was an unqualified acknowledgment of an existing debt; nor was it accompanied with any salvo, or protest, or disclaimer of liability, which could rebut the implied assumpsit, arising on an acknowledged indebtedness.—*Gailer vs. Grennell*, 2 Aik. Rep. 349.

Judgment affirmed.

BENJAMIN D. BROWN vs. BRADFORD SCOTT.

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A son, purchasing a farm, with a view to furnishing a home to an indigent father, and stocking said farm, and permitting the father there to reside and labor, does not subject the products of that farm to attachment on the father's debts.

This was an action of trespass, *vi et armis*, to recover the value of five tons of hay.

It appeared in evidence, on the trial of this cause, that sometime previous to April, 1830, one William Brown, father of the present plaintiff, resided on a farm in the town of Swanton, which farm was rented to the said William Brown by one S. S. Keyes;—that the plaintiff, on the 16th day of April, 1830, purchased said farm of Keyes, for the purpose of providing a home for his father and his father's family; and also purchased stock and farming utensils, suitable for carrying on said farm. William Brown, the father, remained on said farm and carried the same on. It was also proved, that William Brown was poor and destitute. It further appeared in evidence, that on the eighteenth day of December, 1832, the defendant went to said farm and sold a mow of hay at public auction, which hay was cut upon said farm, and put into the barn by William Brown. Said hay was not moved by the officer, or the person who bid it off, but was paid for and afterwards used by said William Brown. It was bid off by a brother of the plaintiff, and to prevent the removal. It also appeared, that the plaintiff never resided on said farm, but that Keyes, previous to the purchase, permitted William Brown to occupy at the request of the plaintiff.

Upon this testimony, the counsel for the defendant requested that a non-suit be directed, as the evidence would not support the present action; which request was refused by the court.

The defendant then gave in evidence, that he was a legal constable of the town of Swanton, and that said hay was levied upon by virtue of an execution to him directed, which execution was issued on a judgment rendered by one Alfred Forbes, justice of the peace in and for said county, in favor of one Zoraster Fisk, against said William Brown, for the sum of fifty-one dollars and fifty-two cents damages, and two dollars and eighty-one cents costs, &c., which, after being advertised according to law, was sold at auction as aforesaid. The defendant further proved, that the said Benjamin D. Brown had stated, that if William Brown could raise any thing more than sufficient to support himself and family, he, Benjamin, was willing it should go to pay William's debts.

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The defendant then offered to prove, that said William had sold hay, stock and grain from said farm, raised thereon since the aforesaid purchase by said Benjamin, and had also purchased a horse and other stock, for which his son gave his note, and put on said farm; all which was excluded by the court, and a verdict directed to be taken for the plaintiff for the amount paid the officer upon the purchase:—to which the defendant excepted, and the cause passed to this court for revision.

Stevens and Foster for the defendant.—1. In this case the defendant contends, that the county court erred in deciding, that the testimony introduced by the plaintiff was sufficient to support an action of trespass, *vi et armis*, because the testimony did not even tend to prove that the defendant had done any act which was in itself immediately injurious to the property of the plaintiff. Without such proof, no action of trespass, *vi et armis*, can be supported. 1 Chit. Plead. 122–8.

2. The sale in this case by the defendant could not operate as an immediate or direct injury to the plaintiff, because it is in proof that the hay was not removed or meddled with by the defendant; and in order to test the question, whether trespass, *vi et armis*, will lie, it is only necessary to examine whether the plaintiff, supposing him to be the owner of the hay had suffered any injury at the time the act complained of was completed. We contend that he had not, for the hay, if ever in his possession, still remained so, uninjured. The act of the defendant, as proved by the plaintiff's witnesses, amounted merely to a slander of the plaintiff's title to a personal chattel.

3. From the evidence introduced by the plaintiff, it did not appear that the defendant was an officer, having right or authority to sell at vendue, as such; his acts must therefore be taken as the acts of a private individual, who could convey by sale no better title than he himself had. Therefore, if he was guilty of a fraud, the purchaser alone could call on him for damages. We allow, that if the property had been removed, the owner might have supported trespass against him who removed it, and against the person who sold and directed it to be removed.

4. It is contended by the defendant's counsel, that, admitting the defendant to be a legal officer, and that he had a process which authorized him to sell the goods and chattels of William Brown, yet, if he levied upon, advertised and sold the goods and chattels of another person, he by such act conveyed no title to the pur-

chaser.—7 C. L. R. 272, *Farrant vs. Thompson*. 3 John. 174, *Wilson and Gibbs vs. Ex. Rend.* 2 John. 48, *St. John vs. Standridge*. 6 John. 44, — vs. *Livingston*.

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If the defendant never injured or removed the property, nor conveyed any title to the purchaser by the pretended sale, he certainly cannot be liable to this action.

5. The defendant further contends, that the property sold, to wit, the hay, was liable to be attached and sold as the property of William Brown, on executions against him; for he must be considered as tenant at will, or a tenant for years; and in either case, whatever he raised was subject to attachment. William Brown cannot be taken and deemed to be the agent of the plaintiff, for the agent must in all cases be accountable to the principal, and from the testimony adduced, this in the present instance was not the case. William Brown was put into the possession of the farm and stock, and directed to support himself and family out of it, and if any thing more, could be made to apply the balance to the payment of his debts.

Who shall be considered landlord, is a consequence to be deduced from the act of the parties.—12 Petd. Ab. 12, 13. A person occupying land by the permission of the owner, or a gift of the use of lands, constitutes the relation of landlord and tenant.—12 Petersd. 17, note.

A disseizor acquires a good title to the crops raised by him upon the land of which he dispossessed the owner, and a tenant at will is entitled to the emblements.—2 B. C. 145, 403. 8 T. R. 3.

Hunt and Beardsley for the plaintiff.—Two questions are presented by the exceptions for consideration.

1. Are the facts stated in this case sufficient, *prima facie*, to entitle the plaintiff to a verdict?

2. Was the testimony offered by the defendant properly excluded by the court?

The determination of the first point depends mainly whether the property in question was the property of the plaintiff, or of William Brown; or whether, granting that in point of fact it was the property of the plaintiff, it was so situated that it might be taken to satisfy William Brown's debts.

It appears by the case, that previous to the purchase of the farm by the plaintiff, William Brown was permitted to occupy the farm, at the request and upon the responsibility of the plaintiff solely. The plaintiff, and not William Brown, was liable for the

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rents. At the time of the purchase, it was agreed, that William Brown should remain upon the farm, have a home there, and his support out of the proceeds of the farm. This certainly could not vest in William Brown such a legal interest in the crops, though produced by his labor, as to render them liable to attachment for his debts. William Brown was to have only his support. That could not be attached, for it was exempt by statute. The over-plus, if any, could not be taken to satisfy William's debts, for he had no legal interest in it. The relation in which he stood to plaintiff was rather that of agent than tenant. The public could not be deceived, because before and at the time he was known to be in destitute circumstances.

2. If the principles above assumed be correct, it necessarily follows, that the court properly excluded the evidence offered by the defendant to show that William Brown sold hay, grain, &c. from the farm; for whatever was necessary to be disposed of in order to the support of William Brown and his family, he had a right to dispose of; and the disposition and sale would furnish no evidence that he has any other or greater interest than has been already considered.

The opinion of the court was delivered by

COLLAMER, J.—The first question raised in this case is, was the property so taken as to amount to a trespass? It appears, that the defendant, as an officer, sold the hay on execution. This is within the case, *Hart vs. Hyde*, 5 Vt. Rep. 328, and must follow that decision.

The principal question, however, is, was this hay the property of the plaintiff, or his father? It seems that the plaintiff purchased a farm to furnish a home for an indigent father, and put on tools, stock, &c. and suffered the father there to labor and live. It is now insisted, that the father was a *tenant* to the son, and so became the owner of all the crops on the place, and that the same were subject to be taken on the father's debts. The court will be slow to give to a *bona fide* support, furnished by a son to a father, such artificial names and technical character as shall in effect discourage and frustrate such praiseworthy objects. To create a *tenancy*, there must be some parting with the possession, so as to give *exclusive* occupancy to the tenant, at least for the time being. Nothing of this kind was shown in this case. The father was suffered to reside there. Now to hold this a *tenancy*, and make the crops there the property of the father, would be forcing upon the

affair a character never designed by the parties, and evidently at war with their legitimate design. The true object is obvious, and the legal character should be holden by the courts to correspond; that is, the plaintiff is the owner of the farm, stock, tools and crops, and has never parted with possession. He is by his father in constructive possession, with the right of taking personal and actual possession at any time. This entitles him to maintain trespass. It appears the plaintiff had said, if more could be raised than was necessary for the father's support, he was willing it should go on his debts. This did not vest the title in the father, or subject it to attachment as his. It does not appear that even enough for the support was raised.

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Nor do the facts offered by the defendant seem to alter the case, had the proof been admitted. He offered to show the father had sold off the crops and had purchased stock on to the farm, for which the son gave his note. This only tended to prove him the agent of the plaintiff, not owner of the property; and had it been shown that the father had purchased the horse and given his own note, it would but have made him the owner of that horse, not of the hay. Much stress is laid by the defendant's counsel on the law of emblements. That only arises where a *tenancy* is shown, and there does not extend to grass.

This case is not to be drawn in precedent to give protection to *fraudulent* transactions. Had any testimony been offered, tending to prove the purchase money had in whole or in part belonged to the father, or that he had been for a long time in exclusive possession, and by valuable labor added greatly to the farm and stock, and was secreting his property from his creditors, by his son's assistance, it would have deserved a different consideration and course of proceeding; but the case is destitute of all circumstances of that character.

Judgment affirmed.

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ADI VINCENT vs. HENRY STINEHOUR.

No action of trespass can be maintained, where the injury complained of results from unavoidable accident, and no blame is imputed to the person doing the injury.

The court are not under obligation to give any opinion to the jury on the weight of testimony.

This cause came from the court below upon the following bill of exceptions :

This was an action of trespass for defendant's driving against and over the plaintiff with his horse and sulkey.

Plea, not guilty—and trial by jury.

The plaintiff gave evidence tending to prove, that he was walking in the road, east of the part usually travelled by carriages, in the town of St. Albans, and that the defendant was travelling the same road with his horse and sulkey, driving fast, and when coming near, the defendant drove out on the east side, in such a manner as to bring his horse in contact with the plaintiff, which knocked him down, and the sulkey wheel passed over his body and leg, whereby he was much bruised and injured.

On the part of the defendant, the deposition of S. P. Bascomb was read.*

A | The plaintiff requested the court to charge the jury, that if they found the plaintiff was walking out of the travelled path, and was run upon by the defendant, the plaintiff must recover, though there was no fault, neglect, or want of prudence on the part of the defendant. But the court declined so to charge.

The court charged the jury as follows :—The parties were legally travelling the road, and the plaintiff has been injured by the defendant ; and the plaintiff is entitled to recover, although the injury was not wilful, unless the jury are satisfied it was the result of accident, unavoidable by the defendant (but there must be some degree of negligence or inattention on the part of the defendant, to charge him.) Every man, in pursuing his lawful business, must use the prudence of the most prudent kind of men ; and if there was any want of the exercise of this prudence on the part of the defendant, either in using an unsafe horse, or in the manner of driving and using the horse, whereby the event happened, the defendant must be answerable, and the jury would assess the damages ; but if the jury were convinced there was no such neglect or want of prudence, but that it was the result of accident, unavoidable on the part of the defendant, they would find for the defendant."

* This deposition was not sent to the Editor.

To which neglect to charge as requested, and charging as aforesaid, the plaintiff excepted; and thereupon the cause passed to this court for revision.

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Judge Turner for the plaintiff.—1. It is contended that the plaintiff had taken all necessary precaution to prevent being injured, and that the injury was occasioned wholly by the act of the defendant.

2. The defendant cannot excuse himself by saying that the injury proceeded from the misconduct of the horse, or inevitable accident.

Nor is this a hardship on the defendant. An injury has been done, and suppose it purely accidental, it is no worse for the defendant to sustain it than the plaintiff. He was guilty of no wrong, and the defendant, to say the least, was driving a skittish horse; and if the horse was frightened and became unmanageable, the injury done by him should be borne by the defendant. It should be his misfortune, and not the misfortune of the plaintiff.

3. Trespass does not imply any evil intention on the part of the trespasser.—1 Str. 596. It may be purely accidental, as where one enters on the land of another by mistake, or where one driving in the dark happens to get on to the wrong side of the road and injure the carriage of another by accident. As is said by Lawrence, Judge, in *Leary vs. Bray*, if one turn round suddenly and knock another down, whom he did not see, and purely by accident, the action would be trespass. And in *Gates vs. Miles*, Hosmer, Judge, says innocency of intention is no excuse.—3 Conn. Rep. 69, 70. 3 East. 595.

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4. Nor is an act of the will necessary to the commission of trespass, for the action may well be maintained against idiots and lunatics, who are presumed to have no will. It was so said by Lord Kenyon in *Ogle vs. Barnes*—"It is clear the mind need not concur in the act that occasioned the injury."—8 T. R. 191. 3 Conn. Rep. 70.

5. The act may be a trespass, though the mind dissent, as where a person goes to cut timber on his own land, adjoining another's, and does not intend to trespass; yet if he cut the other's timber, it would be trespass; and it would be no answer to the action for him to say he did not intend it, and used great precaution, and carefully examined the lines in order to prevent it. And in the case of *Leary vs. Bray*, Lawrence, Judge, says, "The injury might happen where the force of wind and tide operated against

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the force used by the defendant to prevent it.—3 East. Rep. 595. And Lord Ellenborough said, “If one put an animal or carriage in motion, he is the actor.

6. Where an act occasions an injury, the law always presumes some degree of fault. Suppose A should cut a tree on his own land, and it should fall into the enclosure of B, and kill B's horse, would it be any answer to an action by B, for A to say he verily thought the tree would fall the other way, and when he found it was likely to fall on B's land, he did all in his power to prevent it?

7. The defendant put the deposition of Bascomb into the cause, which was the only evidence on his part, and the plaintiff contends that the court ought to have charged the jury, that if they believed the testimony of Bascomb, the law arising from the facts stated by him would entitle the plaintiff to a verdict.

Hunt and Beardsley for the defendant.—The only question presented by this case is, whether, where one man, in the proper exercise of a lawful employment, is the occasion of damage to another, and the act producing the damage could not be controlled by the use of proper prudence and caution, he is liable to repair the damage, whatever it may be. The defendant insists he is not; that such a case is to be regarded as *damnum absque injuria*; that it is essential that some degree of blame be imputable to the party, in order to constitute such damage or injury; and that no one can, in any shape, be made answerable for the consequences which his prudence could not avert.—Ham. N. P. 67. 1 Sw. Dig. 478.

If this view of the subject be correct, it results that the instructions of the court to the jury were correct.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—In this case the jury must have found, that the injury suffered by the plaintiff was the result of unavoidable accident, and that there was no want of prudence or care on the part of the defendant. They were instructed by the court, that if they found these to be the facts, their verdict must be for the defendant.

The plaintiff contends in this case, that the injury arose from the unlawful act of the defendant. This, however, is taking for granted the very point in dispute. If the act which occasioned the injury to the plaintiff was wholly unavoidable, and no degree of blame can be imputed to the defendant, the conduct of the defendant was not unlawful. From an examination of the case, we

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find the charge of the court was conformable to the law, and is wholly unexceptionable. The principle of law, which is laid down by all the writers upon this subject, and which is gathered from and confirmed by the whole series of reported cases, is, that no one can be made responsible, in an action of trespass, for consequences, where he could not have prevented those consequences by prudence and care. Thus it has been laid down, that if a horse, upon a sudden surprise, run away with his rider, and runs against a man and hurts him, this is no battery. Where a person, in doing an act which it is his duty to perform, hurts another, he is not guilty of battery. A man falling out of a window, without any imprudence, injures another—there is no trespass. A soldier, in exercise, hurts his companion—no recovery can be had against him. In the case of *Gibbons vs. Pepper*, 4 Mod. 405, it was distinctly decided, that if a horse runs away with his rider, against his will, and he could not have avoided it, and runs against another, it is no battery in the rider, and he can defend under the general issue. In the case of *Wakeman vs. Robinson*, 2 Bing. 213, in trespass for driving against plaintiff's horse, and injuring him with shafts of a gig, it was considered a good defence, that the horse was frightened by the noisy and rapid approach of a butcher's cart, and became ungovernable, so that the injury was occasioned by unavoidable accident. In the case of *Goodman vs. Taylor*, 5 Car. and Payne, 410, which was an action of trespass for an injury done to a horse by a poney and chaise running against it, evidence was given on the part of the defendant, that his wife was holding the poney by the bridle, when a punch and Judy-show came by and frightened the poney, which run off with the chaise. It was held, that if true, this was a good defence on a plea of not guilty.

It has also been considered, that if a man is entirely deprived of the command of his will and actions, and occasions an injury, he is not accountable for the injury which he involuntarily occasions; as if, from motives of self-preservation, he should jump out of the window of a house on fire, and fall against another; or in endeavoring to save another from inevitable destruction, he should run against some one;—or if he is deprived of all control over his will by idiocy, or permanent madness, and should injure another, it is considered as an involuntary trespass, for which no recovery can be had. In the case of lunacy, it has been held, that a man is answerable in trespass for an injury which he occasions to another. This, however, is on the strength of authority alone. To prevent any abuse of this protection, a person is accounted negligent or

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careless, and blame is imputed to him, if he does not use an extraordinary degree of circumspection and prudence, greater than is commonly practiced, and if he might have prevented the accident. Therefore, where a person is doing a voluntary act, which he is under no obligation to do, he is held answerable for any injury which may happen to another, either by carelessness or accident. On this principle, the case of *Underwood vs. Hewson*, 1 Str. 596, was decided. The act of uncocking the gun was voluntary, not unavoidable; a greater degree of prudence was therefore required. The case of a man turning round, and knocking down another, whom he did not see—the shooting an arrow at a mark, which glanced—were of this class. The act was purely voluntary, not one which the person was required to do. In the case of *Leadame vs. Bray*, 3 East. 593, it was decided only that trespass was the proper remedy, where the injury was immediate; that it was not necessary that the act should be wilful; that although the injury happened accidentally by misfortune, yet the defendant was responsible, where it was occasioned immediately by his act, when he was driving the wrong side of the road. In that case it is to be noticed that blame was imputable to the defendant.

We have examined this case more particularly, as the highly respectable and learned counsel for the plaintiff, for whose opinion we entertain a great respect, has urged so strenuously that a party must in all cases be answerable for an injury occasioned by a horse which he is riding, and that the doctrines to the contrary, found in the elementary writers, are only the opinions of the writers, and not founded on adjudged or reported cases. The result of our examination is, that we think there must be some blame, or want of care and prudence, to make a man answerable in trespass, and that where a horse takes a sudden fright, and there is no imprudence in the rider, either in managing the horse or in driving an unsafe horse, and the horse runs against another, and injures him, the trespass is wholly involuntary and unavoidable, for which no action can be maintained. And although a man is held responsible for injuries occasioned by his cattle, as was urged in the argument, it is on the ground that blame is attached to him in not restraining them, that it is his duty to keep them from mischief, and make use of care and prudence proportioned to the necessity of the case. It is on the ground that no blame is attached to him, that he is not responsible for damages arising from the vicious propensity of domestic animals, unless he knew of such propensity, and neglects to take the proper precaution to prevent their injuring others.

Another question has been made in this case:—whether the judge should have charged the jury, that from the evidence contained in the deposition of Bascomb, the plaintiff was entitled to recover. Upon this subject it is only necessary to remark, that the deposition tended to prove the facts contended for by the defendant. It does not appear that it was the only evidence in the case. The jury were to determine the facts, and it is clear that the court would not have been justified in saying to the jury, upon this evidence, the plaintiff was entitled to a verdict. The jury, as they believed or disbelieved the testimony of Bascomb, or taking it in connection with the other testimony, not detailed in the exceptions; might have come to the conclusion, that the injury to the plaintiff was the result of unavoidable accident, or that it arose from want of prudence, and returned their verdict accordingly. The court were not requested to express any opinion upon this deposition. It was wholly optional with them, whether to give an opinion upon the weight of the testimony, or as to what facts were proved. Their neglect to give this opinion can never be urged as a reason for reversing a judgment.

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The judgment must therefore be affirmed.

JOSEPH WEEKS vs. HUBBARD B. BURTON.

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An action can be maintained for a false and fraudulent representation of the responsibility of a person, whereby an injury has been sustained by the one to whom it is made.

A representation that a note is good is equivalent to representing that the maker is responsible.

This was an action of trespass on the case, alleging that the defendant, by falsely and fraudulently affirming that one Elijah Baker was good and responsible, and that said Baker's real estate was unencumbered, had induced the plaintiff to receive of the defendant a note of sixty-five dollars, signed by Baker, in part payment for a horse sold by the plaintiff to the defendant. The note was dated, March 27th, 1831, and payable four years from date, with interest.

The plaintiff, on trial upon the general issue, gave in evidence, that on the third day of February last, he sold a horse to the defendant, and received said note in part payment for the same; that the plaintiff requested the defendant to endorse the note,

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which defendant refused; but that at the time, the defendant said the note was good, and also told the plaintiff, that he had, on the Thursday preceding, been at the town clerk's office in Georgia, where said Baker resided, and that one of said Baker's farms was unencumbered, and the other was mortgaged. It further appeared by the plaintiff's showing, that on the said Thursday the defendant was at Georgia, and that said Baker at that time had real estate in Georgia, free of encumbrance, to the value of more than one thousand dollars. It also appeared from plaintiff's showing, that defendant had, on one other note which he held against Baker, attached eighteen head of cattle, and that they were then in custody of the officer, at the house where the sale of the horse took place; and it did not appear whether Weeks had knowledge of the attachment or not at the time of his receiving the note; but after he received the note, and before he delivered the horse to defendant, he was informed of that fact, and did not then offer to return the note or have the trade rescinded.

It also further appeared, from the plaintiff's showing, that Seymour Eggleston, sheriff, had, that morning previous to the trade with Weeks, called at the house of Mrs. Ball, where the trade was made, and informed her, in presence of defendant, that he could not find personal property of Baker's sufficient to secure the payment of a fifty dollar execution, which he then held against Baker, adding that Baker's creditors had stripped him; but that said Eggleston gave no information respecting the real estate to the defendant. It was proved by other evidence, that very early that morning, the creditors of Baker had taken all his property, real and personal. The plaintiff was acquainted with Baker, and resides within five miles of him. The defendant resides in the state of Ohio, and was then here on a visit. It did not appear that defendant gave notice to the plaintiff of the information he received from Eggleston.

Upon this statement of facts, the defendant contended that the jury could not be warranted in finding a verdict for the plaintiff.

The court charged the jury, that the defendant's declaration at the time of sale, "*that the note was perfectly good,*" was tantamount to saying that Baker was amply responsible; and whether they supposed Weeks to have placed any reliance on the declaration, or not, as mere matter of opinion as to the previous general responsibility of Baker, (which was probably as well known or better to him than the defendant) it might properly be assumed that he relied on it as an assertion that defendant was aware of no

recent facts unknown to Weeks, which were inconsistent with the opinion that the note was good; or in other words, that Baker would prove responsible. The suppression of the information received from Eggleston, and the defendant's affirmation respecting the note were therefore a fraud on Weeks, and entitled him to a verdict.

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Verdict and judgment for plaintiff, and exceptions by the defendant to the charge were allowed and certified.

Mr. Stevens and Mr. De Witt for the defendant.—1. In this cause the defendant contends, that the evidence introduced by the plaintiff did not even tend to prove the allegations contained in his declaration.

2. It is contended, that the court erred in charging the jury that the defendant's declaration, "that the note was perfectly good," was tantamount to saying that Baker was amply responsible. For the descriptive term, "good," does not amount to a warranty.—1 Aik. Rep. 269, *Barrett & Co. vs. Hall & Co.*

3. In order to sustain this action, it is not only necessary that the representation of the defendant to the plaintiff was untrue, but that it was made by the defendant knowing it to be false, and that the plaintiff has in consequence of such false representation suffered a loss.—2 East. Rep. 92, *Hoycroft vs. Creasy*. Fell on Guar. 387.

In this case the defendant made no false representation. The situation of Baker's real estate was as represented, and the note was good; that is, it was exactly what it purported to be, not a forgery, and for aught yet known, may be paid when it arrives at maturity.

When the defendant refused to endorse the note, he thereby gave notice to Weeks that he must take the note at his own risk, if he took it all.

It is also contended, that there is no evidence that the defendant stated any thing which he knew to be false, or even any thing which he had reason to doubt. Baker, on the Thursday next preceding the sale complained of, was possessed of more than one thousand dollars worth of real estate, which was unencumbered.

Might not the defendant then have honestly recommended him to have been good for so small a sum as sixty-five dollars, when it is not proved that defendant knew of Baker's being indebted in any other sum than the fifty dollars mentioned by Eggleston.

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J. Smith for the plaintiff.—1. It is contended by the plaintiff, that the declaration made to him by the defendant, at the time of the sale of the note in question, “*that the note was perfectly good,*” was, in the language of the judge, who tried said cause, “*tantamount to saying that Baker was perfectly responsible.*”

2. The suppression of the fact, by the defendant, that he had attached the cattle of Baker on Thursday before the sale of the note, and also of the information which he received from Eggleston, the sheriff, on the morning before the sale of the note, was such a fraud upon the plaintiff as would make the defendant liable in this action.

The case is so plain, that it is unnecessary to make any reference to authorities in support of the principle contended for.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The principles of law upon which this action is sustained were declared in the case of *Pasley vs. Freeman*, 3 T. R. 51, and were recognized by this court, at the present term, in the case of *Ewing vs. Calhoun*. To maintain it, the plaintiff must have proved the representations made by the defendant in relation to the note against Baker, the falsity of those representations, the knowledge of the defendant in relation to the falsity, and that the plaintiff sold the horse and took the note on the faith of those representations, and was thereby deceived. The evidence was, that plaintiff sold the defendant the horse, and received the note in payment; that defendant refused to endorse the note, but at the time declared that the note was good; and that on the Thursday preceding, the defendant had been at the town clerk’s office in Georgia, and that one of Baker’s farms was unencumbered. To prove the falsity of these representations, the evidence was, that the defendant then had attached, on a note which he held against Baker, eighteen head of cattle, which were at that time in the custody of an officer; that the sheriff had informed a Mrs. Ball, in the presence of the defendant, that he could not find personal property of Baker’s sufficient to secure a fifty dollar execution, and that his creditors had entirely stripped him of property. The evidence was also, that in fact the creditors of Baker had that morning taken all his property, both real and personal.

The inquiry is, whether this evidence tended to prove the plaintiff’s declaration; and of this there can be no possible doubt. By a representation that a note is good, no other meaning is conveyed, than that the maker is responsible. It would be a far-fetched sup-

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position, to say that the parties understood from this expression no more than that the note was genuine. It is in no particular similar to the declaration made, as reported, in the case of *Barrett & Co. vs. Hall & Co.*, 1 Aik. 269, where the word good was made use of as applicable to an article of merchandize. As applied to a note, it has a different meaning, and is clearly equivalent to saying that the signers are responsible. It is also to be considered, that the representation was made on a request, by the plaintiff to the defendant, to endorse, and thereby guarantee the payment of the note when it became due, and was also connected with a representation of the property of Baker, and his ability to pay the same. Was this representation false, and known so to be to the defendant? The testimony was abundant to this point. His own attachment, the representation made by Eggleston, the sheriff, in his presence, and the actual condition of Baker at the time, all prove these facts. And his refusal to endorse, and concealing the information which he had thus obtained, are evidence of a design to impose on the plaintiff, and induce him to take the note in payment for the horse. His giving the information of the situation of Baker's property, as it was on the Thursday previous, without at the same time communicating the fact of his failure and insolvency, was well calculated to deceive and defraud the plaintiff. Neither can we see any failure of evidence to convince the mind that the plaintiff relied on this representation, or that if the whole truth had been communicated to him, he would have parted with the horse and received the note in payment without endorsement. Baker was apparently good but a short time previous. There is no evidence that the plaintiff had heard of his failure; nor can it be believed for a moment, that if defendant had communicated all the facts in his knowledge, without endeavoring to create the impression that Baker still remained a responsible man, the plaintiff would have accepted the note. In short, the conduct of the defendant on that occasion, if the testimony as detailed in the bill of exceptions was true, was too evidently designed to create a false belief in the plaintiff, to enable the defendant to profit thereby.

On the whole, the declaration appears to have been proved in every particular, and the charge of the court was correct.

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JOSEPH WEEKS vs. ORLANDO STEVENS.

A jail bond is taken primarily for the benefit of the sheriff, who may institute a suit thereon for his own benefit, control and release the same.

Quere—Whether a bankrupt sheriff would be permitted fraudulently to discharge such bond.

This was an action on jail bond. The defendant plead a release from the plaintiff, Weeks. The plaintiff replied that the bond was the property of Hezekiah Niles, of which notice was given to the defendant before the date of the release, and that said Weeks never had any equitable interest in the bond. But there was no allegation that the bond was either assigned or delivered to Niles, nor was it stated how it became his property.

To the replication there was a special demurrer, and assigning, among other causes, the omissions in the replication adverted to.

Stevens and De Witt for defendant.—1. When a sheriff takes a bond for admitting a debtor to the limits of the jail yard, such bond is the property of the sheriff, and cannot become the property of the original creditor, except as directed by the eleventh section of the act relating to jails and jailers.—Rev. Stat. 220. That statute authorizes the sheriff to assign such bond, but not until the condition thereof is broken.

2. It is contended, that said replication is insufficient, because the plaintiff does not aver that said bond was assigned, sold, or even delivered, by said Weeks to said Niles. On the contrary, the plaintiff negatives any such conclusion, by affirming that said bond was always the property of said Niles.

That courts protect the rights of assignees, is not disputed. But it is contended, that when an assignee attempts to avoid the act of his assignor, in whose name the suit is prosecuted, it is necessary that he should in his replication aver the following facts:

- (1.) That the bond, bill or note was legally assigned.
- (2.) That it was for a good and sufficient consideration.
- (3.) That the bond, bill or note was delivered to the assignee.
- (4.) That notice of such assignment was given to the debtor.
- (5.) That the suit was commenced by the assignee, and is prosecuted by him for his own benefit.

15 Mass. Rep. 117, *Perkins vs. Parker*. 11 Mass. 490, *Wood vs. Partridge*.

In this case the plaintiff has made no such averments.

N. L. Whittemore, contra.—The demurrer to the replication will extend to the first defect in the pleadings, and it is insisted that the plea in bar is insufficient.

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1. The plea ought to have alleged that the discharge was executed since the last continuance. It is incumbent on the defendant to make his defence the first opportunity, and if a continuance intervenes, he cannot put in such a plea. It is not sufficient to allege, that the defence arose since the commencement of the action.—Chit. 552-3.

2. Jail bonds are taken as additional security to the creditor, who owns all the interest in the original demand, on which the bond is predicated, and who is, *de facto*, owner of the bond after it is executed. The sheriff has no other interest than as an agent, liable to his principal for the sufficiency of the bond, and it is his duty to assign the bond to the creditor, on demand, without any new consideration for so doing; and the remedy on the bond is the principal one for the creditor to pursue.

3. The defendant, to avail himself of the sheriff's discharge, must show by his plea that the interest of the creditor in the bond had been extinguished by payment of the original debt; and it is necessary to aver in the plea, that all the interest was in the sheriff when the release was executed, and in what manner the interest of the creditor had passed to the sheriff.

4. As to the first cause of demurrer, it is not a matter of law, but of fact, that the replication attempts. To put in issue whether the nominal plaintiff has any interest in the bond, is a fact proper for the jury to try. The allegation is, that H. Niles is the sole owner of the bond, and that is sufficient to show that the sheriff has no interest in it.

5. The commitment is not a satisfaction of the debt, and the commitment is stated as inducement to other facts that follow, and prior matter of inducement is not admissible.

6. The replication is not double and multifarious, for the facts stated go only to make one answer to the plea.—Chitty, 640, 604, 593.

7. It is sufficiently understood from the replication, that the bond was delivered, that Niles was the owner of the bond, and that Weeks had no right or authority to discharge the same. And again, it is not necessary to allege a delivery of the bond. The sheriff prosecutes the bond, not for his own benefit, but for the benefit of the creditor, and the creditor, at any time, has a right to control the prosecution. His discharge, in all cases, is good, and

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the sheriff cannot object, unless he shows that the debt has been satisfied and paid to the creditor by the sheriff. A delivery without an assignment amounts to nothing; and if an assignment was averred, it would defeat a suit in the name of the sheriff.

It is clear that the creditor has a right, before the bond is either assigned or delivered, and while in the possession of the sheriff, to discharge or claim his lien on the bond, by giving notice to the debtor that he must not pay the amount to the sheriff, but must pay the same to him.

If the last proposition be correct, then the replication is sufficient; for it is alleged, that the defendant had notice on the tenth day of April, 1833, which was previous to the execution of the release.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—This is an action of debt on jail bond, to which the defendant pleads a release by the plaintiff, Weeks. The plaintiff replies, that the bond was the property of Hezekiah Niles, of which notice was given to the defendant before the date of the release, and that Weeks never had any equitable interest in the bond. To this replication there is a demurrer.

An objection has been taken to the form of the plea, as it is not stated that the release was executed since the last continuance of the case. The plea was put in at the September term of the court, and the release was executed on the ninth of the same month. The defect in the plea, if there is any, is only in a matter of form, and the plaintiff should have demurred specially, if he considered that there was a defect in this particular.

In the replication, it is to be noticed, that it is not alleged that the bond was either assigned or delivered to Mr. Niles; nor is it stated how, when, or in what way, it ever became his property. Unless, therefore, such a bond is taken entirely for the benefit of the creditor in the execution, and the interest therein is in him, when taken, this replication cannot be sustained. A jail bond is taken, principally, for the indemnity of the sheriff, and belongs to him until it is assigned. It is assignable to the creditor, and no action can be maintained against the sheriff, until the creditor has failed to recover the contents of the persons who executed the bond, if the sheriff shall on demand assign the bond to the creditor. But, until assignment, the sheriff may maintain an action in his own name, where there has been a breach of the conditions; and as he is ultimately responsible for the ability of the signers of the

bond, he may prefer to maintain the action rather than assign. If the creditor does not demand the bond, and the signers are in failing circumstances, if he can secure it on real estate, which the creditor may not think proper to accept, or if, from any cause, it is his interest to retain the bond, he may commence a suit thereon in his own name and for his own benefit. If he can commence a suit, he may control it, receive the pay, make a compromise, take real or personal estate in satisfaction, and in short, act in prosecution of the suit for his own benefit. But in this he must act fairly and with good faith, and without any attempt or design to wrong or defraud the creditor. As the creditor may be considered as having an interest in the bond, the sheriff may not wantonly, or fraudulently, discharge a bond thus taken. A bankrupt sheriff would not be permitted to discharge or release a bond, with an intent to injure or defraud a creditor. A creditor might be permitted, in certain cases, where the sheriff was a bankrupt, and fraudulently attempted to control a jail bond, or wantonly refused to assign, to commence a suit, in the name of the sheriff, on such bond, and pursue it for his own benefit. It will be sufficient, however, when such cases arise, to determine on the respective rights of the creditor and the sheriff. It is sufficient, in this case, to say, that no such facts are stated in this replication, neither fraud or bankruptcy in the sheriff; nor is it stated that the suit is brought for the benefit of the creditor, and how or in what way he ever acquired any interest or property in the bond, either legally or equitably, so as to preclude Mr. Weeks from commencing this action in his own name, or controlling a suit thus brought. That this bond was ever in the possession of Mr. Niles, does not appear from any facts stated in the replication. The replication must therefore be adjudged insufficient, and judgment rendered for the defendant.

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CLARK and MEIGS vs. AZARIAH WATERMAN.

Where a person called a physician to attend, at his house, upon a female, who had been brought up in his family, but after coming of age, had the control of her time, and had resided in different families, but when taken sick, resided in his family as a servant, without any stipulated wages—*Held*, Such person is liable, as upon an original undertaking.

Dictum—A person is not ordinarily liable to pay for medical attendance on his servant.

This cause came here upon exceptions to the decision of auditors, who reported the facts to be as follows :

That in 1815, or 1816, the defendant received into his family one Caroline Hubbard, then about eight years of age, to keep, educate and maintain, till she should arrive to the age of eighteen years ;—that said Caroline served out her minority, and afterwards continued to work in the defendant's family nearly all the time till her death, which happened soon after she was twenty-three years of age ;—that during the five years of her freedom, she worked some in other families, in which cases she made her own contracts and received pay to her own use, and was at liberty to go and come when she pleased, without asking permission, but was not out of the defendant's employ to exceed one eighth part of the time, and that when in his employ she worked without any contract or accounting ;—that she was taken sick at defendant's house, and while in his employ, as above mentioned, the fore part of November, 1830, and the defendant, in person, called on Doctor Meigs, one of the plaintiffs, and requested him to go and see Caroline, and Meigs accordingly visited her, and administered medicine, and continued his visits till defendant, finding fault with the practice and experience of Meigs, said he would call Doctor Clark, and accordingly called on Doctor Clark, the other plaintiff, in person, and requested him to visit Caroline, and in compliance with that request, Clark visited her and administered medicine till she died, the last of January following ;—that during Caroline's confinement, the defendant, in person, frequently called on said Doctor Clark, and requested him to go and see his girl and cure her ;—that not far from the time she died, defendant called on plaintiffs for the amount of their account, saying he wanted to lay it before the town, to see if they would not assist him. All the charges in the account accrued for the services above mentioned.

The defendant filed his exceptions—

1. That said Azariah Waterman was in no way bound or obligated in law to support or provide for the said Caroline Hubbard, and that the said Caroline, if living, was alone accountable for the attendance of said physicians.

2. That no sort of promise, from or by the said Azariah, was proved before said auditors, to be accountable for the doctoring the said Caroline, either by the parties or any indifferent persons.

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3. Because it does not appear by said report of the auditors, that the said Azariah did any thing more than call on the said Clark or Meigs to visit said person, then sick at his house, as a common messenger or friend.

4. Because it does not appear by said report, but to the contrary, that said Caroline was a natural or adopted child of said Azariah, or that he was in any way bound to support, provide for, or take care of her, after she arrived at the age of eighteen years.

The county court rendered judgment for the plaintiff, and defendant excepted.

Sawyer and Weeks, for the defendant, cited 2 Stark. Ev. part 4, p. 94—note Z, citing *Wennall vs. Adney*. 2 do. part 4, p. 82. Peters. Cond. Rep. 196. 3 do. 270. 1 Stark. 870. New. on Con. 352.

Mr. Reed contra.

The opinion of the court was delivered by

MATTOCKS, J.—The question is, whether the facts found by the auditors will in law justify the conclusion they came to, that the defendant was liable to the plaintiffs for their services as physicians, in attending upon Caroline Hubbard, then resident at defendant's house. If it was the intention of both parties that the defendant should pay the bill, then it would be a contract to that effect. The employment or request to attend upon the patient was made and often repeated by the defendant, in person. Complaints of the inefficient practice of one of the plaintiffs, and an exchange for the other, like a man acting in his own business, and at last a virtual admission that it was his expectation to pay, by calling for the bill to lay before the town, "to see if they would not assist him;" this appears like an original employment by the defendant; and the plaintiff's making the charges directly against him is evidence that they so understood it. If these facts were such as it would have been proper, in action of assumpsit, to have left to the jury, then they were sufficient for the auditors to act upon. The other circumstances in the case, that the patient had been brought up by the defendant, and although she had been three years out of her time, yet continued most of the time in his family, and "in his employ, without contract or accounting," renders it not improbable

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that he was willing to render her all needful aid in time of sickness, and that his intention was really such as his conduct naturally indicated. It is true, as contended by defendant's counsel, and as stated by Starkie, "that a master is not liable on an implied assumpsit to pay for medical attendance on his servant." Although Lord Kenyon, in *Learman vs. Castell*, 1 Esp. Rep. 270, ruled he was, yet it had before, in *Newbury vs. Willshire*, reported in 2 Esp. 739, in King's Bench, been decided otherwise; and in *Wennall vs. Adney*, 3 B. and P. 247, it was fully so settled; but never, it is believed, has it been so decided, if the attendance was at the request of the master. But however that may be, we do not put the case upon the ground of master and servant; but there being a request by the defendant, in his own name, upon the credit of which the services were rendered, it is very much as if the defendant had directed a shop-keeper to deliver her goods; and if he had not added, "charge them to me," or "I will pay for them," yet he would be chargeable with what was delivered in consequence; certainly, if by any subsequent act it should appear that he expected to pay for them. There seem to have been benevolence and kind intentions in the defendant towards the suffering female to whom he had formerly been in the place of a parent, and who was still an inmate of his family; and he should now meet the expenses those good feelings have occasioned to the plaintiffs; for although their practice was not successful, yet the result was quite professional. We do not mean by this determination to intimate, that a man who, by himself or another, happens to go for a doctor to attend a hired man, or maid, or sister, or friend in his house, is of course liable to pay the bill. In many, and perhaps most of these cases, the person going or sending might be regarded as a mere medium of intelligence that a physician was wanted; but where the proof in the case is sufficient, as we think it was in this case, to authorize the triers to find that the defendant intended, and gave the plaintiffs so to understand, that he was himself the employer, then the original credit was given to him; then he is liable upon general principles, and it not being the debt of another, is not affected by the statute of frauds.

Judgment of county court affirmed.

HORACE EWINS *vs.* ISAAC CALHOUN.

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Number fifteen, section first, of the act regulating judicial proceedings, is a general enactment, comprehending all cases where there has been bail put in before the action is entered, either by endorsing the writ, or entering bail for an appeal.

Parol evidence is admissible to sustain an action for falsely and fraudulently representing a person of sufficient ability to pay a certain amount.

This was an action on the case, and the plaintiff declares, that on "the 14th day of February, A. D. 1832, at Berkshire, a discourse was had between the plaintiff and one Samuel Calhoun, jr. and the defendant, of and concerning the plaintiff's selling to the said Samuel Calhoun, Jr. a certain stud horse, of which the plaintiff was then possessed, of the value of two hundred dollars, and of and concerning the said Samuel's purchasing the said horse, and giving his promissory note for seventy dollars, in part payment for the same, payable in the month of October then next. And the plaintiff not knowing the circumstances of the said Samuel, and whether he was of ability to pay the said sum, declined and refused to trust the said Samuel with said horse, or to take his promissory note therefor, unless he could be assured of the said Samuel's ability to pay said sum. And the defendant, then and there, well knowing that the said Samuel was not of sufficient ability to pay said sum, and was wholly insolvent, and well knowing that the said Samuel never intended to pay said sum, but to cheat him out of it, then and there falsely and fraudulently affirmed to the plaintiff that the said Samuel was a person of interest, and of sufficient ability to pay the said sum, and that the plaintiff need not be afraid to give him credit, or to take his promissory note, payable as aforesaid. And the plaintiff says, that, believing and trusting in the said false information of the defendant, he did then and there give part credit to the said Samuel for said horse, to the amount of seventy dollars, and took his promissory note of that date for the payment of the same in the month of October, 1832. And the plaintiff says, that the said Samuel was then wholly insolvent, which the defendant well knew, and that he has never since been able to find the said Samuel, who absconded and left the country immediately after the purchase of said horse, and has not since returned, and that he has wholly lost said sum, due by said note."

Plea, general issue.

On motion of the plaintiff, the court ordered the defendant to furnish additional bail; to which decision the defendant excepted.

On trial, the plaintiff offered to prove the representation, that Samuel Calhoun, jr. was good and trustworthy, alleged to have

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been made by the defendant, by parol. To the admission of this evidence the defendant objected, but the objection was overruled and the evidence admitted. The defendant insisted that the facts alleged by plaintiff in his declaration did not entitle him to a verdict against defendant, and requested the court to charge the jury to that effect. But the court instructed the jury, in substance, that the plaintiff, on proof of the allegations in his declaration, would be entitled to recover.

To the aforesaid decision and instruction the defendant excepted. The defendant also moved an arrest of judgment for the insufficiency of the declaration, which was overruled by the court; to which the defendant also excepted.

Exceptions were allowed and certified.

S. and A. Brown for defendant.—The order of the county court in this case, requiring the defendant to furnish additional bail, was erroneous and oppressive; and for this he ought to have a new trial.—Stat. 71, 97, 125.

2. The declaration and the facts in the case do not authorize the court to render judgment for the plaintiff. [The counsel here cited 3 T. R. 51, which was decided in 1789—*Eyer et al. vs. Dunsford*, 1 East. 318, decided in 1801—*Haycroft vs. Creasy*, 2 East. 91, decided also in 1801.]

An action on the alleged grounds of the declaration is an invention of modern times to elude the operation of the statute of frauds. It had the sanction of high judicial authority for a short period, but it has been finally adjudged otherwise, and an act of Parliament has at length settled it against such action.—*Tap et al. vs. Lee*, 3 B. and P. 367, decided in 1803. Wilk. on Lim. 121–63, and authorities there referred to.

Hunt and Beardsley contra.—Two principal questions are raised by the exceptions:

1. Whether the court properly admitted *parol* evidence to prove the representations made by the defendant of Samuel Calhoun, jr.'s solvency or trustworthiness.

2. Whether the court erred in their directions to the jury.

The first question is not new. It has been thoroughly examined in England and in this country, particularly in New York; (*Upton vs. —*, 6 John. 181;) and so far as our investigation of authorities has gone, they uniformly come to the same conclusion. The *statute of frauds*, in causes of this description, has no application.

The next question is, whether the court erred in their instructions to the jury. This part of the question naturally divides itself into two general subjects of inquiry—

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1. Whether an action of this description can be sustained at all.

2. Whether, if sustainable, does the declaration contain sufficient allegations to entitle the plaintiff to recover.

That this action is well founded results not only from the plainest principles of common justice, but is established by a series of adjudications.—*Pasley vs. Freeman*, 3 T. R. 51. *Eyer et al. vs. Dunsford*, 1 East. 318. *Haycroft vs. Creasy*, 2 East. 92. *Upton vs. Veil*, 6 John. 181. *Bean vs. Bean*, 12 Mass. Rep. 20. *Patten et al. vs. ———* 17 Mass. 182.

The foundation of the action is, fraud and deceit in the defendant, and damage to the plaintiff; and when these two concur, the action will lie.

The main question in these cases is, whether the representation was made in good faith, and with a belief of the truth of it; and if the jury, to whom the question is properly submitted, find them in the *negative*, fraud, which is the gist of the action as a matter of law, at once results, and determines the plaintiff's right of recovery; and this the jury have found by their verdict.

The next inquiry is, whether the present declaration contains the necessary averments. It is sufficient, we apprehend, substantially to allege that the representation was made *mala fide*—that it was false, that the defendant knew it to be false, and that, relying upon the representation, the plaintiff sustained damage. All these allegations are contained in the present declaration.

The opinion of the court was delivered by

MATROCKS, J.—The exceptions present several questions, which will be disposed of in their order.

1. That the county court, on motion of the plaintiff, ordered the plaintiff to furnish additional bail. The act regulating judicial proceedings, section 45, p. 71, requires the plaintiff, in writs of attachment, to give security by way of recognizance to the opposite party for costs, and provides that, pending any suit, on the suggestion of the defendant that the surety or recognizance is insufficient, the court may order further bail. This act gave the courts no authority to order the defendant to put in bail; but an additional act, number 15, p. 97, section 1st, after mitigating the liability of the sheriff as to bail, in certain cases, says, "and if the plaintiff shall, pending any suit, suggest to the court that the surety

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or sureties are insufficient to respond the judgment that may be recovered in said action, the court may, in their discretion, order bail to be put in sufficient for the purposes aforesaid, by such time as they shall direct, or otherwise order judgment as by default."

This clause, although inserted in the same section which speaks of sheriff's bail, is a distinct and general enactment, and comprehends all cases where there has been bail put in before the action has been entered, either by endorsing the writ, or entering bail for an appeal from a justice; and so it has been construed, and bail ordered in such cases at discretion. This decides this objection, without stopping to inquire whether, if it were otherwise, we could reverse the judgment for this irregularity, especially after the order has been complied with, and the cause proceeded to trial.

2. It has been urged, that no action of this sort should be sustained, that the attempt is a modern innovation upon the common law, and in fraud of the very statute of frauds, and has lately been abolished by act of parliament. In the case of *Pasley vs. Freeman*, 3 T. R. 51, which was very like this case, the court sustained the action. Gross, J., having led with an opinion for the defendant, the other judges gave full and separate opinions the other way, which, especially as they contain some very good discourse upon the interesting subject of lying, are well worth the further perusal of the bar. To the objection there taken, that the action was new, Ashurst, J., said it was not new in the principle, but only in the instance; and to the objection, that to support the action of *deceit* not only one party must lose but the other make, he says it is the more diabolical to lie without the temptation of gain, and the gist is the injury done to the plaintiff; and he thought that one great reason why actions had not before been brought against those not interested in the fraud was, that others would not be likely to be concerned in such practice; and it may be added, if they were interested, it would in most cases be impossible to prove it. That case was, we think, decided upon the soundest principles of justice and common honesty, and having been followed by other cases in England and the neighboring states, as appears by the cases cited by the plaintiff's counsel, we adopt it as the law of this land, and for the reasons I refer to the case in the Term Reports. They being nearly the last set of the English Reports that contain any great body of the law, are in almost every office. If this action has been destroyed by an act of Parliament, it only shows, that although it was not of ancient growth, it was so firmly rooted that it required that powerful engine to uplift it. If, as stated by coun-

sel, (for I have not seen the act,) it requires the fraudulent representations to be in writing, it is singular, and it would seem must be intended to prevent any redress in those cases. That the evidence of contracts which require mutual consent should be required to be in writing, or have any other prescribed formalities, is practicable at least, and may be useful. But that the proof of facts which constitute fraud or crime should be so privileged, would exempt most offenders. To undertake to prevent fraud by supposing all verbal communications false, would destroy all confidence in business and in society. Great practices of perjury may have required this act in England, but merely the fear of it here should not prevent us from acting upon the great principle upon which the action is founded, unless our legislature also interfere. But the theory of the requirement of the act, unless it was intended to expunge all remedy in such cases, is as singular as to require swindling or *crim. con.* to be proved by a memorandum in writing.

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The last question is, the motion in arrest for the insufficiency of the declaration. This is little else than the same question in another form, whether this action can be sustained, as the declaration certainly contains all the essential facts and averments of that in 3 T. R., which was holden good, and no technical defects have been named or seen that would have made it defective even before verdict.

Judgment of county court affirmed.

JAMES FARNSWORTH vs. JASON C. PIERCE.

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The court, upon the application of one party, and without the consent of the other, will issue a *dedimus potestatem* to take testimony in a foreign jurisdiction.

This was an action of assumpsit, in two counts, to which the defendant plead the general issue.

It came here from the county court upon a bill of exceptions taken upon the trial before the jury, by the defendants, to the admission of depositions taken in Canada, by commissioners, under a *dedimus potestatem*, granted on application of the plaintiff, to which it did not appear that the defendant had ever given his assent. Other exceptions were taken, but on trial here were abandoned.

Smalley & Adams for defendant.—The county court could not, on the application of the plaintiff, legally issue a *dedimus potestatem*

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to take the testimony of witnesses in Canada, without the consent of the defendant.—1 Stark. Ev. 276, 277. 1 Arch. Prac. 153, 154. *Stevens vs. Crichton*, 2 East. Rep. 256. *Taylor vs. The Royal Exchange Insurance Company*, 8 East. 329. *Calliand vs. Vaughan*, 1 B. and P. 209-10.

In this case, such consent is wanting; therefore the depositions offered by the plaintiff were improperly admitted.

Hunt and Beardsley contra.—The first question presented by the exceptions is, whether the court properly admitted the depositions of John Taylor and others.

In the absence of any statute regulation on the subject, the plaintiff insists that the court, *ex officio*, have the power to prescribe forms and regulations in the procurement of testimony necessary in the proper administration of justice. Courts in England have in some instances exercised it, and for a long time it has been the common practice of our courts.

Without the exercise of this power by our courts, there must be in many cases a total failure of justice for the want of testimony of witnesses, where attendance could not, by any legal process, be compelled.

The opinion of the court was delivered by

MATTOCKS, J.—The only question which has been argued in this case is, whether the county court has power, on the application of one party, to issue a *dedimus potestatem* to take testimony in a foreign country, without the consent of the adverse party. The other exception taken at the trial is abandoned. As the case does not say whether the commission to take testimony was issued with or without consent, perhaps we might be justified in presuming consent. But as the main question is of some practical importance, and has not been directly decided by this court, we do not presume consent, but decide the question submitted.

In England, a party in a suit at law can obtain a commission by applying to the court of chancery, without the consent of his adversary. But in the courts of law, unless the opposite party consents, none are granted.—1 Chit. 276, and note. The reason of this difference is not stated, but probably it is because all writs originally issued from the chancery, and common law courts have not, as yet, in this instance, presumed to interfere. But as the expense of the commission, in chancery, is borne by the applicant, so at law, when consent is given, it is ordered in the same way;

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for otherwise, consent would never be obtained. This obliges the prevailing party to lose the expense of obtaining his necessary testimony, which the courts regret, but do not avoid, lest it drive the applicant into chancery, which would be far more expensive. They also endeavor to force the adverse party to consent, but, it seems, with little effect, in many cases. Some authors say, the court will put off the trial until the other party will consent. That may do where the defendant applies, but if the plaintiff desires the commission, to put off the trial to punish the defendant would be like reprieving a criminal, unless he would consent to be executed. But Starkie says, "The court will put off the trial at the instance of the defendant, if the plaintiff will not consent; and if the defendant refuse, the court will not give him judgment, as in case of a non-suit." What will they do? Not continue, not try, not non-suit! This must be what is meant by hanging up a case. Yet, though this practice of the English courts, of requiring consent, seems unnecessary, it may be tolerable there on that island, where foreign jurisdictions do not come to suitors' thresholds, and where the court of chancery is always open. But here, where we are separated on most sides from other jurisdictions by only a mathematical line, and witnesses are daily floating away by the tide of emigration, and our court of chancery is seldom open, to deny the right, or to embarrass it with useless and unreasonable conditions, would in some cases prevent justice, and in many make expensive delays. But it is said that letters rogatory may be issued, and the courts of other countries may deign to take the testimony for us. But why obtest foreign tribunals to do that for us that we can better do for ourselves, by appointing a competent individual.

It has also been objected, as a reason against the power to issue the commission, that the witnesses would not be liable to indictment for perjury. This was intimated by the court in *Calliand vs. Vaughan*, 1 B. and P. 210; but it was on the ground that the commission would be illegal without consent. There is no intimation given, that if the commission was legal, the deponents would not be liable; and if we hold that the commission legally issued for one purpose, it would follow that it was legal for all purposes.

As to other objections to a conviction, they would be the same with consent as without. Nor would the legislature, if they passed an act be likely to do more than to expressly authorize the courts to issue commissions; still leaving the other questions to be mooted before the courts here or abroad, where the indictment may be found. And it may be sufficient on this point to say, that it must

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be the understanding of the judges and chancellors of England that the party offending may be punished somewhere, or the practice would not be continued there. To issue these commissions in any case, or to refuse them in all cases, here, is more than is or can be contended for. So that the question comes to this, may not our courts, which are entrusted with the general power of administering justice, adopt the salutary usage of the common law courts, dropping as it were the proviso, which conflicts with the enacting clause. We do many things here directly, that in England are done by useless circuitry, mostly indeed by legislative provisions. But we think it will not be overstepping the bounds of judicial modesty to make the correction in this point by our own inherent authority. It is believed that the practice in this state has been pretty general, if not universal, to issue these commissions, and that without consent being asked or required; and this, probably, is the reason why this power is given by the third section of the probate act to that court; it being supposed that the superior courts already had and exercised the power, but to a court of particular jurisdiction it was needful to confer it. Usage alone, this being rather a matter of practice, might be a sufficient ground for us to decide as we do, that the *dedimus potestatem* was legally issued, although without consent; and therefore the testimony taken under it was properly admitted.

Judgment affirmed.

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THOMAS H. CAMPBELL vs. ELIAS PATTERSON.

A writ of error does not lie to correct a misprison of the clerk, in entering up judgment for too large a sum, but the remedy is by application to the court in which the record is, to amend it.

Error to the county court for the county of Franklin. This writ was brought to reverse the judgment of the county court, in the suit *Elias Patterson vs. Thomas H. Campbell*, at their September term, A. D. 1833.

It appeared upon inspection of the record, that the original suit was upon a promissory note, dated February 26, 1816, alleged to have been made at Cambridge in this state, for the sum of \$739 87, and made payable in thirty days with interest. The judgment of the county court, upon *nil decit*, was for the sum of \$1693 68, damages and costs. Upon a computation it was found, that the

amount of the note, including interest at six per cent., to the date of the judgment, was only \$1519 93. The error relied on was the rendering judgment for the excess, being the sum of \$173 75, over and above the amount of the note.

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Aldis for the plaintiff in error.—The judgment upon which this writ is founded was rendered by the county court at their September term, 1833. The original action was assumpsit upon a promissory note, executed by Campbell to the defendant and one Asa Gardner. The note was dated, Cambridge, (Vt.) 26th February, 1816, and was for the sum of \$739 87, and payable in thirty days from date, with interest.

The county court rendered judgment for the then plaintiff, Patterson, for the sum of \$1693 68 damages.

The sum of \$739 87, with interest on the same at six per cent from the date of the note to the last day of the term at which judgment was rendered, only amounts to \$1519 93; and no larger sum for damages than \$1519 93 ought to have been given.

1. The place where the note is dated must be taken to be the place where the contract was made, and the law of the place where the contract is made determines the rate of interest, unless it appears from the express terms or the nature of the contract, that the parties had reference to the laws of some other place.—2 Kent's Com. 460.

In the present case there is nothing to show that the parties had reference to the laws of any other state than Vermont. It does not appear but that both parties lived in this state when the contract was made, and no foreign place is set for payment.

2. Admitting the residence of the defendant to have been in New York when the contract was made, yet mere residence in a foreign state has never been held a circumstance sufficient to determine the construction of the contract according to such foreign law.

The rule of law is, that the law of the place *where the contract is made* governs its construction, unless the transaction is entered into with a view to the law of some other country.—Burrows, 1077, *Robinson vs. Bland*.

But the doctrine contended for would change the principle to this, viz: that the law of the ~~place~~ *where the creditor resides* governs the construction, &c. The maxim, that "personal actions follow the person of the creditor," means nothing more than that such contracts may be enforced in any country which the creditor

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may choose, and that the debtor, to make a tender, must go to the creditor.—13 Mass. Rep. 1 and 6, *Blanchard vs. Russell*. 1 Cowen, *Sherrill vs. Hopkins*.

Suppose the payees of this note had endorsed it to a third person. To whom and at what place should the note have been presented for payment or protest, so as to hold the endorsers liable? At the place of payment, which is the residence of the maker.—Bayley on Bills, 126, and cases there cited. 2 Pet. Cond. Rep. 351.

3. As foreign laws are admitted by other states only *ex comitate*, the court will exercise a discretion in regard to them; and when, as in this case, they contravene the policy of our state, and operate to the injury of our citizens, they ought not to be sanctioned.

4. But even at seven per cent., the interest and sum make only \$1649 95; while the judgment rendered is \$1693 68.

A *remittitur damna* can only be entered by leave and direction of court. A judgment cannot be corrected or altered by a party. If parties had the right to correct mistakes in the judgments of courts, according to their own notions of right, records would soon cease to be the highest kind of evidence.

Smalley and Adams for defendant in error.—1. What damages was the defendant in error entitled to recover on the declaration in the court below?

This question must be determined by the facts which the plaintiff below was entitled to give in evidence in support of his declaration.

Under this declaration he could have given in evidence a note made in China, and payable there.

In declaring on a foreign bill or note, it may be stated to have been made at any place in England, and this would be no variance, per Lord Ellenborough in *Houiet vs. Morris*, 3 Camp. Rep. 303. Bayley on Bills, 268.

The place of payment could not be stated in the declaration, unless the place of payment was specified in the note declared on. Bayley on Bills, 272. *Exon vs. Russell*, 4 Maul and Selwyn, 505.

The damages which the plaintiff below would be entitled to recover must be governed by the law of the place where the contract was to have been executed. *Robinson vs. Bland*, 2 Burr. 1077. *Royce and Henry vs. Edwards*, 4 Pet. Rep. 123. *Fanning vs. Consequa*, 17 John. Rep. 519. *Consequa vs. Williams*,

1 Pet. C. C. Rep. 225. 2 Cond. Rep. 353. *Sherrill vs. Hopkins*, 1 Cow. 107-8. *Thompson vs. Ketcham*, 8 John. Rep. 146. *Scofield and Taylor vs. Day and Gilston*, 20 John. Rep. 102. See 6 Cond. Rep. where all the cases are noted.

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2. If there was error in the computation of damages, it is aided by the *remittitur* entered by the defendant in error on the record below.—2 Arch. P. 242. *Packwood vs. Wright*, 1 H. B. 643.

The opinion of the court was delivered by

PHELPS, J.—The error alleged in this case is, that the county court rendered judgment for more than the amount due upon the note. If this be so, it probably originated in the misprison of the clerk in entering up judgment in the case, and admits of an easy remedy by application to that court to correct its records,—a power which every court possesses and exercises in such cases in a summary way. A writ of error in such case is a proceeding not to be favored; and it becomes a question of some practical importance whether it lies at all.

Errors are of two kinds, viz: errors in law, and errors in fact. Writs for error in fact never lie, to draw into controversy any matter of fact litigated in the original suit, or which was put in issue by the pleadings. Error in law lies, where upon the facts apparent of record, the judgment is improper. But no writ of error lies to re-examine a question of fact depending upon the evidence in the original suit, nor to re-examine a mixed question of law and fact. Hence where the point depends upon evidence, and the inquiry is of a mixed character, a bill of exceptions is necessary to lay the foundation for a writ of error. And even where a bill of exceptions is allowed, and error brought, the only legitimate subject of inquiry concerns the correctness of the legal rules adopted, and the accurate application of them to the facts stated in the record. Even here, no evidence is received, nor inquiry allowed, upon evidence extraneous of the record, nor as to the sufficiency of evidence to establish any fact, except so far as the legal tendency of the evidence is involved, or its sufficiency may be determined by abstract rules.

In this case the error assigned is technically an *error in law*, and the question is, whether it is apparent upon the record before us, that the court below ought to have rendered a different judgment.

So far as the facts are conclusively determined by the pleadings in the case, they are to be taken as the basis of our decision, but so far as they depend upon evidence, which might have been the

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subject of discussion in the court below, every presumption is to be made in favor of the judgment of that court which is not positively inconsistent with the record. So far as by the rules of law the facts must have been proved precisely as alleged, to that extent they are to be taken as having been so proved; but where the proof may legally vary from the declaration, they are to be presumed to have so varied, if it be necessary to support the judgment.

Whether, then, error lies for rendering judgment for a different sum from that declared for, depends upon circumstances. If it appear, that the judgment was for a greater sum than the party would, in any event, and upon any supposable state of evidence, be entitled to, the judgment is doubtless erroneous. So, anciently, where the action was for a debt in *numero*, while the rule obtained that the plaintiff could recover only for the precise sum declared for, a recovery for any other sum was erroneous, and this although he declared for a greater sum than he is entitled to. *Duppa Exor vs. Mayo*, 1 Saund. 281. It is undoubtedly true, at this day, that the plaintiff cannot recover except *secundum allegata et probata*, and if the recovery exceeds the amount declared for, it is erroneous unless cured by a *remittitur*. But so far as the amount of damages is uncertain, depending upon evidence to be exhibited to the triers, it is very certain that their finding is conclusive and cannot be re-examined by writ of error. It would be repugnant to the nature of a writ of error, and utterly inconsistent with the proceeding upon it, to sustain it, upon a suggestion that the jury have erred in the computation of damages. Such a proceeding would necessarily lead to the re-examination of evidence, and overleap at once the wide distinction between proceedings in error and proceedings upon appeal.

The question then is, whether in this case the judgment is inconsistent with the declaration, or in other words whether there be any supposable state of evidence, admissable under this declaration, which would warrant the recovery.

The note in question is described as having been made at Cambridge in this state. It was not however necessary to prove a note executed at that place, but a note made elsewhere, even in another jurisdiction, would support the action.—*Honriett vs. Morris*, 3 Camp. 304. Bay. on B. 22, 305. So “the court will not take judicial notice, that a bill was drawn abroad, though alleged to have been made at Dublin.” *Kearney vs. King*, 2 B. & A. 301. *Sprowle vs. Legge*, 1 B. & C. 16. Deybel’s case, 4 B. & A. 243.

The note in question may be intended to have been made in New York where the payee resides. At all events, we cannot judicially know that it was not so, and if such an assumption is necessary to sustain the judgment, the fact may well be presumed, as proof to that effect was consistent with the declaration. If the note were executed in the state of New York, then the legal rate of interest in that state must be allowed, as it does not appear to have been made payable elsewhere.

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But it is insisted that the judgment is too large, even if seven per cent. interest is allowed. But how are we to know judicially what is the legal rate of interest in that state? Besides, the note may have been executed in some jurisdiction where a higher rate is allowed. In short, as the declaration in the original suit admits of evidence which would warrant the finding, and as there is nothing apparent of record to negative the supposition, that such evidence was exhibited, it follows that the judgment is not, upon the face of the record, necessarily and conclusively wrong.

We do not admit, that we may be required upon this proceeding to re-examine the computation of a jury, or to correct a misprison of the clerk in the court below. If we admit such a practice, we may be required upon a writ of error to do it in any case, and even to reverse a judgment for some trivial error, occurring in some nice calculation of principal and interest, growing out of numerous endorsements. And in such a case, we can make no distinction in principle, between this case and one, where owing to payments, the amount recovered, although less than the original amount of the note, may be more than the plaintiff is in reality entitled to.

The plaintiff in error has mistaken his remedy. Instead of this process, he should have filed his bill of exceptions, if there were in reality any controversy as to the rate of interest, and brought before this court the facts, which would have enabled us to judge whether the court below acted upon any erroneous principle. If there has been a mistake through the misprison of the clerk, in computing the amount of the note, he should have applied to the court below to have it corrected. That court might either correct the error directly, or grant a new trial for a new assessment, unless the plaintiff below would remit the excess. Such application may be made even now.

Judgment affirmed.

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ADMINISTRATOR OF HORACE JANES vs. JAMES MARTIN and RUSSELL S. MARCY.

It is not an available ground of exception, that the county court admitted parol proof of the contents of a paper, supposed to be lost, upon proof of loss, which this court might deem unsatisfactory.

The purchaser of personal chattels, at a sheriff's sale, is not affected by any irregularity or impropriety in the officer's proceedings, but the officer is liable therefor to the party injured.

This was an action of trespass, for taking as the property of Henry N. Janes one double waggon, one single sleigh, one double harness and one single harness.

Plea, not guilty. On trial, the plaintiff, to show title to the property in question, offered to prove by parol the following facts:

That Horace Janes, in his life-time, took out an execution in his favor against the said Henry N. Janes, for about one hundred and thirty-seven dollars, signed by James Davis, justice of the peace, issued on a judgment by confession of said Henry N.;—that said execution was delivered to one of these defendants, Russell S. Marcy, constable of Montgomery;—that said Marcy levied said execution on the property in question, together with a considerable amount of other property;—that he posted said property for the space of fourteen days, and that, at the end of that time, he sold the same at auction to the plaintiff's agent, he being the only bidder.

To the admission of this evidence, the defendants objected, but the court admitted the evidence; the judgment being first proved by production of the original note and confession, and said Davis having testified that execution issued thereon, but had never been returned to his knowledge, and if ever returned, could not be found.

The defendants, on their part, justified the taking under legal process in favor of Abel Carter, against said Henry N. Janes.

The defendants also further proved that the sale of said property was in the chamber of the said Henry N. Janes; that no part of said property was present, it being in the shed, yard and barn of said Janes; that the only persons who attended the sale were, the plaintiff's agent, one Allis, Henry N. Janes, the officer, Marcy, and one Jeremiah Janes; that all the property was put up together and struck off at one time and upon one bid to Allis, he being the only bidder, and the agent of the plaintiff, expressly directed to bid in said property for the plaintiff; that the property sold and bid off by the plaintiff's agent on that occasion, at a fair cash val-

ue, amounted to considerable more than sufficient to satisfy the execution.

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Upon these facts the defendants requested the court to charge the jury that the sale was illegal, and that the plaintiff acquired no legal title to said property as against a *bona fide* creditor under the sale; but the court refused so to charge the jury, and in substance instructed them, that it was necessary the property should have been posted in some public place in the town at least fourteen days before the sale, setting forth the time and place of sale, and that the sale should have been made in good faith, and without any design in the officer, or concert between the debtor and creditor, to have it pass to the creditor at an under value, by means of its being put up together and not in parcels. And if they should find from the evidence that it was thus posted, that the property was known to the persons present at the sale, and might readily have been seen, and that there was no such design to have it go at an under value, the manner in which the sale was in fact made did not render it illegal. But if they were not satisfied in favor of the plaintiff, upon each of these points, the defendants should recover.

Verdict and judgment for plaintiff, and to the decisions and charge the defendants excepted. Exceptions allowed and passed to the supreme court.

Smith and Hoyt for plaintiff.—The first question presented by the case for the consideration of the court is, whether the county court erred in permitting the plaintiff to prove by parol testimony the loss of the execution and officer's return.

It would seem that on this point there could be no doubt, inasmuch as it appears from the case that it was proved that the execution and the return of the officer were either lost or mislaid. The case then clearly comes within the rule of law which provides that the contents of any *writing, process or record*, which is lost, may be proved by parol testimony.

2. Did the county court err in refusing to charge the jury (as requested by the defendants) that Horace Janes acquired no title to the property in question under and by virtue of the aforesaid sale at auction, as against a *bona fide* creditor of Henry N. Janes, from the consideration that the defendants proved on the trial, that the sale was made in the wood-house chamber of the said H. N. Janes, when the property was in the barn, sheds and yards adjacent; that the only persons present at the sale were the plaintiff's agent, one Jeremiah Janes and H. F. Janes; that all the property

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was struck off at one time and upon one bid to the plaintiff's agent; and that the property sold in payment of said execution was in fact worth more than the amount bid by the agent.

Now it cannot be seriously contended, that the facts shown on trial by the defendants rendered the sale of the property to Horace Janes, *ipso facto*, void. It was proper that the facts proved by the defendants should be submitted to the jury, to be weighed by them in making a decision, whether there was in the sale and purchase of the property any fraud in fact. The jury have had all the facts under consideration, and have found that the sale was *bona fide*.

It is true, that, by the first section of an act directing the levying and serving executions, it is made the duty of the officer in his return to describe particularly the goods or chattels taken and sold, and the sum for which each article is struck off. But what if the officer does not in his return set forth the sum at which *each article* was sold, does such neglect render the sale void, so as to defeat the title of the honest purchaser? Certainly not. If there is any *fraud* or *collusion* on the part of the officer in the sale of property, or in making his return, a full and adequate remedy is given against the officer. The statute makes him liable to pay to the debtor treble damages for the sum of which he has been defrauded.

Hunt and Beardsley for the defendants.—The first question presented by the case is, whether the testimony offered by the plaintiff and admitted by the court was legal and proper to show a valid transfer of the property to the plaintiffs.

In order for the plaintiff to recover, it is indispensable to show by proper evidence that the title of the property in question was legally in the plaintiff's intestate. This, we insist, cannot in the present case be shown by *parol*.

It is a well settled principle of law, that the best evidence of which the nature of the case is susceptible must be produced. In the present case, no reason is furnished why the execution itself and the officer's return, or a certified copy of the record thereof was not produced; and without satisfactorily accounting for the non-production of this evidence, which is the legal and best evidence, it is a violation of the long established and very satisfactory rule of evidence to supply it by *parol*.

We apprehend that no case can be found where a purchaser at sheriff's sale has ever been permitted to make a title to the property purchased by *parol* proof of the issuing of the execution and all the subsequent proceedings thereon.

The case of *Bates vs. Carter* 5 Vt. Rep. 602, might at the first view seem to militate against this ground. But it will be noticed that the question raised in that case was not whether parol evidence of the officer's proceedings was admissible, but whether the officer's return on the execution, which was produced in evidence, was sufficient to have passed the legal title to the purchaser. We are not disposed to war with the ground taken by the court in that case. It may be, and probably is, a correct determination, that the title of a purchaser at a sheriff's sale ought not to depend upon the strict legality of the officer's proceedings.

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The question in this case is not, whether the officer's proceedings were all legal, (for they cannot be examined,) but the question is, whether legal or illegal, his proceedings can all be shown by parol.—*Williams vs. Amory*, 14 Mass. Rep. 29. *Hammet vs. Wyman*, 9 Mass. Rep. 138. *Woodcock vs. Bement*, 1 Cow. 784.

It certainly cannot be the policy of our law, however it may regard the interest of purchasers, to permit the introduction of parol evidence in all cases to make out and support perfect titles to property acquired at a sheriff's sale. If it is admissible in the present case, it is admissible in all cases, and records might at once be dispensed with.

2. The court ought to have charged the jury, that the manner in which the sale was made was illegal and inoperative to transfer a legal title, or at least that it furnished evidence of a fraudulent design on the part of the creditor and debtor to have the property pass at an under value.

The statute requires that the property should be exposed, and that the officer should return on the execution a particular description of the property sold and the sum for which each article was struck off.—Stat. 209.

This requisition cannot be complied with, when different articles are put up at the same time, and in one lot or bunch are struck off together. In these particulars, the statute regulations were wholly disregarded, and it was the duty of the court, in view of the facts, to have instructed the jury that they ought to regard the manner of conducting the sale, (all the parties interested being present,) as tending to prove, and from it they were at liberty to infer, a fraudulent conduct between the creditor and debtor to have the property struck off at an under value.

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The opinion of the court was delivered by

PHELPS, J.—That the execution, if to be found, or a copy duly authenticated, should have been produced, there is no doubt. But it appears, in this case, that the secondary or parol proof of the existence and contents of the paper was received upon proof of its loss. Whether the proof of the loss was sufficient or not, it is not our province to determine. It was a matter of fact to be settled by the court below, upon such evidence as was satisfactory to them, and even if the evidence were unsatisfactory to us, it would furnish no legitimate ground for reversing their judgment. It is not a ground of error.

The evidence as to the proceedings of the officer, in conducting the sale, was doubtless proper, as tending to show the sale fraudulent and *mala fide*; but of this proof, the defendants had the full benefit, in the manner in which it was submitted to the jury.

Admitting the proceeding of the officer to have been irregular, yet it does not follow that the sale was void. If there be any thing improper in the transaction, it consists in the circumstance that the manner of sale was unfavorable to the debtor, as tending to dispose of the property at a reduced price. In this point of view, it was a matter which concerns the debtor alone, and for which he has his remedy against the officer. It is certainly not competent for a stranger to interfere and contest the title of the purchaser. It is a settled rule, that the sale is not to be affected by any irregularity or impropriety in the proceedings of the officer. The purchaser is not supposed to be cognizant of the previous proceedings, nor can he be affected by the subsequent acts of others. It is on this ground, that our statute gives a remedy to the debtor, in such case, against the officer.

Judgment of county court affirmed.

JOHN W. MARTIN vs. JOSEPH FAIRBANKS.

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It is the duty of a justice of the peace, in an action of book account, to adjust the account up to the time of trial. So of the auditors in an appealed case.

An article delivered on a credit, not expired at the commencement of the suit, may nevertheless be allowed, if the credit have expired before trial.

This was an action of book account, brought by appeal to the county court, and referred to an auditor, who made the following report, viz :

"The auditor reports a balance in favor of the plaintiff of \$5 47.

"Your auditor further reports, that the agreement between the parties was, that the defendant was to let the plaintiff have towards his services charged in his account, during their performance, grain and goods, such as the plaintiff might want and call for, and if any thing remained due to plaintiff, when he closed his work, it was agreed to be paid during the winter next following, in grain. The defendant did, at sundry times, let the plaintiff have grain and other articles, for which he regularly charged the plaintiff on book ; but the defendant did not let the plaintiff have, nor did the plaintiff call for articles of property sufficient to balance his accounts for his services. The plaintiff did not call for the balance due him from the defendant before this suit was brought. And the suit was brought before the time agreed upon for the payment of the balance of plaintiff's account had elapsed. Defendant insisted that the suit was prematurely brought ; but the auditor decided that, inasmuch as the time of credit had expired, anterior to the audit, it became his duty to allow the plaintiff's account up to the time of the audit. The auditor accordingly allowed the accounts of both plaintiff and defendant, as charged, disallowing some items in plaintiff's account, not established, and reducing the prices of several articles charged in both accounts. All which is respectfully submitted.

H. R. BEARDSLEY, Auditor."

To this report the defendant excepted, upon the ground that the auditor had allowed certain charges of the plaintiff, which had not become payable at the commencement of the suit. The exception was overruled and judgment rendered for the plaintiff on the report ; to which decision of the county court the defendant excepted, and the case came into this court upon that exception.

Burt for defendant.

Stevens for plaintiff.

The opinion of the court was delivered by

PHELPS, J.—This action was brought originally before a justice of the peace, and carried by appeal to the county court, where

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judgment to account was rendered and the case referred to an auditor to examine and adjust the account. It is objected to his report, that he has allowed to the plaintiff certain charges, which, although due at the commencement of the action, had not then become payable; the term of credit having expired before the adjustment by the auditor.

If we consider this case as standing upon the same footing as an original action in the county court, there can be no doubt that the auditor did right in adjudicating upon contested claims, as the statute is peremptory that the auditor shall adjust the account up to the time of making his report. And there is no reason why he should not proceed in the same manner, as if the suit had been original in that court, unless it should be found, that the action in the justice's court would have been governed by different rules.

The question then is, ought the justice, if the suit had remained pending in his court up to the time when the charges became payable, to have allowed the charges, or should he have turned the party round to a new suit to recover them? In other words, is it the duty of a justice of the peace, in the action on book, to adjust the account up to the time of trial, or only to the commencement of the action?

There is no statute provision on this point, the provision above alluded to having reference only to auditors appointed by the higher courts. The action of account at common law has this peculiar feature, that it is not essential to the maintenance of it that the defendant should be indebted to the plaintiff. Hence the only available defence, in the first stage of the action, is such as goes to shew that there is no legal ground for requiring an account. Thus if the parties are found to be partners, or the defendant the bailiff and receiver of the plaintiff, &c., as the case may be, judgment *quod computet* passes of course; and this without reference to the question who is in arrear. The adjustment by auditors is in the nature of an assessment of damages, with respect to which, as a general rule in cases of contract, the damages are assessed and adjusted up to the time of trial. Such is the case with respect to promissory notes and other evidences of debt, and it is only in cases where a future action may be sustained for other and further damages, that a different rule obtains. Hence in account at common law the account is adjusted up to the time of trial. The same rule holds in chancery, when an account is to be taken, whether it be as between partners, or in case of trustees, executors or others. There is the most manifest reason for this. In all cases involving

an account, the only legitimate object of recovery is, the balance, and not any particular item, or items, which may constitute a portion of the account. Besides, there would be a palpable impropriety in rendering judgment upon an anterior state of the account, and leaving the plaintiff on the one hand, to commence a new action upon a subsequent section of it, or driving the defendant, on the other, to his cross action, to recover a counter balance. It is true that a judgment at common law cannot be prospective, to cover what may accrue thereafter, and it is for this reason probably that the common law action of account has fallen into disuse, and that resort is now usually had to chancery.

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The rule of the common law being as stated above, it follows, that the statute is only in affirmance of that law, and that it would have been the duty of the justice, had the suit been ultimately determined in his court, to adjust the account up to the time of trial. The auditor therefore did right in allowing the claim in question.

If it be objected that injustice is done by subjecting the party to costs, when he was not indebted at the commencement of the suit, it may be answered, that this is the necessary result of the statute, as applied to the more important actions of this kind which originate in the higher courts, and is there a matter of common occurrence. It is also the result of the settled rule of the common law, as applicable to the subject of accounting, wherever the account is taken. It is also in this case the consequence of the defendant's own default, for if he had tendered the grain, when it became payable, it would have defeated the action.

Judgment affirmed.

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ANSON HULL, 2d. vs. AUSTIN FULLER.

Where the particulars, in the description of land in a deed, are inconsistent and incongruous, the court may reject a part and give effect to the deed. In doing this, they will be guided by the intent of the parties, as gathered from the deed.

Although a mortgagee, suing in ejectment, must prove his debt, in order to recover, yet a mortgagee in possession, who sues a stranger in trespass or case for a nuisance, need not show his note or bond secured by the mortgage.

In such action, the grantor of the plaintiff is a competent witness for him, unless the title is put in issue by the pleadings.

A party, taking possession of a part of the land conveyed by his deed, is in legal construction in possession of all the land described. But it is necessary that the deed give a definite and certain extent to the land, otherwise he will be deemed in possession only to the extent of his actual possession.

Where commissioners, appointed by the legislature, to re-survey and complete an allotment of a town, alter some of the original lines, and the parties in possession subsequently convey agreeably to the corrected lines, this is sufficient evidence of an acquiescence, and will bind the parties and their grantees.

This cause came from the court below upon the following bill of exceptions.

This was an action on the case for flowing certain lands in Enosburgh, alleged to be the property of the plaintiff, to wit, part of lot No. 216, by means of a dam of the defendant, erected on his own premises. Plea, not guilty.

On trial, the plaintiff offered in support of the issue on his part,

1. A deed from Eliphalet Dickinson to himself, dated June 2, 1823, conveying to him lot No. 216 in Enosburgh, and also a deed from Hare and Lee of the premises to Stephen House, dated Nov. 9, 1809, (which deed was a deed of mortgage,) and an assignment from House to Dickenson, 28 March, 1810.

2. Evidence tending to show, that previous to the flowing of the land complained of, viz. in the year 1823, or spring of 1824, the plaintiff was in possession of said lot, No. 216, and had remained in possession thereof ever since; that in the spring or summer of 1824, and while the plaintiff was in possession, the defendant, being in possession of lot No. 21, adjoining to said lot 216, erected a dam on said lot 21, across a certain stream which flowed over or across both said lots, by means whereof the plaintiff's lot was overflowed, to the great injury of the land. And among other witnesses, the plaintiff offered said S. House as a witness to prove his possession, who was objected to by the defendant as interested by reason of his conveyance to said Dickinson, the plaintiff's grantor; but the objection was overruled by the court and the witness admitted.

The plaintiff having rested his case, the defendant, in order to show a right in himself to maintain the dam in question, offered in evidence—

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1. Testimony tending to prove, that, as early as the year 1798, one Fasset and said S. House were jointly in possession of the land in question, viz. lot No. 21, holding as tenants in common.

2. Sundry deeds, viz: a deed from said Fasset to Abiathar Waldo, dated March 11, 1805—a deed from said A. Waldo to Gursham Waldo, dated Sept. 19, 1818.

3. An act of the legislature of this state, passed Oct. 29, 1810, appointing commissioners to complete the division of the town of Enosburgh, &c. together with the record or return made by said commissioners of their doings.

4. A deed from Gursham Waldo to Daniel Chilson of seventy acres of lot No 21, dated Oct. 14, 1819—a deed from Daniel Chilson to the defendant of the same land, dated June 13, 1822—and a deed from Gursham Waldo to the defendant, dated July 2, A. D. 1824.

5. The defendant further offered evidence tending to prove, that by the original allotment made in 1796 of Enosburgh, lot No. 21 was run out and divided from lot No. 20 in said town by a meridian line, both lots being parallelograms, and lying, No. 20 on the east and No. 21 on the west:—that when the commissioners came to act under the act of the legislature, passed in Oct. 1810, they re-surveyed the lots as far as the east line of lot No. 21, and that No. 21 was re-surveyed. He also proved by the surveyor who run out lot No. 21, under the commissioners, that he began at the north-west corner, and running east one hundred and sixty rods, made his corner and turned first south and then west, laying out No. 21 in a different shape from that in which it was originally laid, adding five acres at the south-east corner for a mill-site;—that he then supposed that the measure (one hundred and sixty rods) would bring him to the original line run in 1796, by him, and as far as the line between No. 20 and 21, but that, upon running the line in 1824, he discovered that lot No. 21 was originally laid out one hundred and seventy six rods in length, instead of one hundred and sixty rods, and that the east line of No. 21, as laid out by the commissioners, was sixteen rods west of his line run in 1796. And the defendant further offered evidence tending to show that the land flowed was originally a part of lot No. 21.

6. It also appeared that lot No. 216 was not laid in the original allotment of said town, but was a *pitch*, made subsequent to the

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original allotment, at some time previous to the act of 1810, which was sanctioned by said commissioners and acquiesced in by the proprietors, and had been occupied accordingly ; and that it was an irregular lot, comprising a part of original lot No. 20, a part of original lot No. 21, and part of other lots ; and that the boundaries of No. 216 were made and marked by visible monuments, without reference to original lines.

7. The defendant also offered evidence tending to prove that he took possession of lot No. 21, under his deed from Chilson, as early as the year 1822, and has continued in possession to the present time. The defendant also offered to prove by said Chilson, that as early as the year 1810, he was in possession of lot No. 21, under said Waldo, with a view to give a further or greater extent to lot No. 21, than that fixed by the commissioners' survey in 1812 ; but the court decided, that no possession of Chilson previous to that survey would avail the defendant, unless it was followed by an actual possession afterwards of the land in question, by the defendant or his grantors, but the defendant would be restricted to the limits of No. 21, as surveyed by the commissioners, unless he proved an actual possession since of lands lying out of those limits. The defendant was also permitted to give evidence that he or his grantors had flowed the land in question, either wholly or in part, at any time previous to the plaintiff's possession of lot No. 216.

The defendant objected, that no constructive possession could be derived to the plaintiff through his deed from Dickinson, inasmuch as the last boundary on the description was on the east or right bank of the branch, and that therefore no line could be run from that to the first boundary on the west bank of the same. But the court decided, and so instructed the jury, that when there is an incongruity or inconsistency in the description in a deed, a part may be rejected, if a sufficient description remain ;—that if a part be impossible, it may be rejected, and if the description be inconsistent, that part should be rejected which goes to defeat the intention of the parties, as apparent on the face of the deed, or that part which would defeat the deed altogether—and that part adopted which gives effect to the deed ;—that in this instance, the impossibility of running the line on the west side of the branch would not render the deed void, but that the line should be run from one point to the other, conforming as near as possible to the words of the deed, but rejecting the expression, “on the west side,” &c. where it became indispensable ;—and that, in the opinion of the

court, the line should run from the last monument to the west or left bank, near the bend as laid down in the plan, and thence on the west side of the boundary first mentioned ;—and that the plaintiff, if in possession of any part of lot No. 216, under his deed, would be constructively in possession of the whole, unless a part of lot No. 216 was covered by the commissioners' survey of lot No. 21.

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The court also charged the jury, that the defendant did not acquire a right, by virtue of any of the deeds offered by him, to flow any land other than what was contained in lot No. 21, as surveyed by the commissioners ;—that the original line between No. 20 and 21, as run in 1796, was immaterial, provided the limits of No. 21 were designated by the commissioners by any visible monuments ;—that the deed from Chilson to defendant limited him to lot No. 21, and that it therefore became unnecessary to inquire what rights Waldo might have had originally, inasmuch as he had restricted his deed to Chilson to No. 21 ;—and further, that the deed from Waldo to the defendant did not convey to the defendant any further or greater right than he possessed before, inasmuch as it appeared on the face of the deeds that Waldo, Chilson, and defendant had acquiesced in the doings of the commissioners, and indeed held under them ;—that they were to be regarded as having sanctioned the proceedings of the commissioners in ascertaining and settling the uncertain boundaries of their land, and as having waived any uncertain or indefinite claim which Waldo might have previously had ;—that Waldo must be presumed to have parted with all his title by his deed to Chilson in 1819, and that, of course, he had no further interest to be conveyed to the defendant by his deed of July 2, 1824.

The court further charged the jury, that the plaintiff could not recover, unless he had proved that the land flowed was a part of lot No. 216. Nor could the plaintiff recover, if the land flowed was a part of No. 21, as surveyed by commissioners, whether a part of No. 216 or not.

They further charged the jury, that the right to flow the land in question might be appurtenant to lot No. 21, and that if the defendant or his grantors had actually flowed the land in question to any extent before the plaintiff took possession, they had a right to flow it to the same extent afterwards ;—that, therefore, if the defendant had flowed the land before, to the full extent of the flowing since, the plaintiff could not legally recover. But if the defendant had flowed the land since the plaintiff took possession to a greater extent than it was flowed before, the plaintiff would be entitled to receive for the injury sustained by the excess.

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The defendant also offered the testimony of a surveyor, stating that, in the year 1809 he run out the lot No. 216 for said House, and that he run the same according to the description of the plaintiff's deed from E. Dickinson, except that he did not run the last line, to wit, from the last monument in the description to the one started from, (the hemlock stump;) that he was directed by House to stop at the end of the "twenty-eight rods," as he wished to leave a sufficient space for a mill-pond. And the defendant, in connexion with this, offered to prove that the termination of the "twenty-eight rods" was at the edge of the pond as raised by defendant's dam. This evidence was objected to by the plaintiff, and rejected by the court.

The defendant also offered a plan of said town, proved to have been made from the surveys of the commissioners in 1812, to prove that the east line of No. 21 was further east than the line run by the commissioners as the east line, which plan was admitted and may be referred to as a part of this case. But the court instructed the jury, that if the commissioners, by their survey, fixed the east line of No. 21 further west than the line run in 1796, between 20 and 21, that the *actual* line of the commissioners would govern, and must be taken to be *the* line between these parties, and not the old line of 1796.

To the several decisions above mentioned and the charge aforesaid, the defendant excepted. Exceptions allowed and certified.

J. Smith for defendant.

Hunt and Beardsley and Smalley and Adams for plaintiff.

The opinion of the court was delivered by

PHELPS, J.—The first point, in the natural order of this case, arises out of the proof offered by the plaintiff of his title to the land in question. It is objected, that the deed from Dickinson to him is void for want of a sufficient description. There is an inconsistency in the description of the land conveyed, in this particular: the first boundary given, or the starting point, is on the south or west bank of the stream, on which the defendant's mills are located. After giving several courses and distances, the line is brought to a point on the north or right side of the stream, and then follows this expression, "*thence, on the south side of the branch, to the bounds first mentioned.*" The two *termini* of this last line being on opposite sides of the stream, this part of the description becomes impossible; so far, at least, as this, the line can-

not lie "*upon the South side of the branch.*" This inconsistency, it is argued, vitiates the deed. Upon reference to the deed, it is found, that this difficulty does not appear upon its face, but is discovered by tracing the courses and distances upon the land. The description in the deed is well enough, but the difficulty occurs in its application. It is not, therefore, *ambiguitas patens*, but a latent ambiguity, which may well be cured by extraneous proof. It is the common case, of a want of perfect correspondence, in the several particulars given in the deed, by way of description.—Nothing is more common than to find, upon applying the description in a deed to the several localities referred to, that course or distance, or the precise relative location of visible objects has been mistaken. It never was supposed that a deed is void for such inaccuracies. But the difficulty being latent, the intent of the parties may be ascertained by extraneous proof. The rule which allows resort to such proof, of itself implies the validity of the instrument.

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The expression 'on the south side of the branch,' is not necessary to a perfect description of the land. It is a mere redundancy, and if it be rejected the description is not only perfect but consistent throughout. There is no doubt that we are authorized to reject the expression. It is a general rule, that where the intent of the parties is satisfactorily ascertained, and their contract can be carried into effect, agreeably to that intention, incongruities and inconsistencies are to be reconciled; and such parts, as through misapprehension tend to defeat that intent, are to be discarded. More especially, where in a deed of conveyance, the land intended to be conveyed is clearly ascertained, is a redundancy or over-particularity of description to be disregarded. So too, when an inaccuracy occurs in any particular, added for greater certainty, but found to be misapprehended by the parties, it is the duty of courts to correct the mistake, and to see that a misapprehension in a point not essential, shall not vitiate the contract or defeat its manifest purpose. *Mossie vs. Watts*, 6 Cranch 148.—*Ship vs. Miller 2 Wheat.* 316.—*Newsom vs. Pryor* 7 do. 7.

In determining which of two inconsistent requirements of a deed shall be rejected, the proper criterion is the intent of the parties, as gathered from the deed itself. That part is to be rejected which tends to defeat the intention of the parties, or to defeat the deed, and that part adopted which consists with the one and sustains the other. At the same time every part of a description is to be regarded, as far as may be, and is to be rejected only when indis-

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pensable. Hence the expression, 'on the south side of the branch,' is to be conformed to, as nearly as the localities will permit. Upon inspection of the plan, it is apparent, that the last course, if run agreeably to the direction of the jury, will be very near a straight line, and will, at the same time, pass, for most of its length, on the south side of the branch. The direction to the jury on this point we think correct.

It is next objected, that the plaintiff's title being that of a mortgagee, the note secured by the mortgage should have been produced. The rule requiring the production of the note, does not apply to the case of a mortgagee in possession. Much less would it apply in this case, where possession alone is sufficient to sustain the action, and the defendant is a stranger to the mortgagor's title.

The objection to the competency of House, the grantor of the plaintiff, is clearly unfounded. Whatever may be the issue of this suit, neither the verdict nor judgment could be evidence in any suit between the plaintiff and the witness, in relation to the title; because it concludes nothing. To make the verdict or judgment evidence between them, the title must be put in issue by the pleadings.

The important question in the case, however, arises upon the evidence offered by the defendant, and the decision of the court below thereon.

It is insisted, that by virtue of some or all of the deeds offered by the defendant, or by the possession of his grantors under them, or both, the defendant had acquired a title to the land flowed, or at least such a possessory right as justifies the flowing.

And here it is to be borne in mind, that the jury were distinctly charged, that the plaintiff could not recover for flowing any part of lot No. 21, but that, to entitle himself to a verdict, he must prove an injury done to lot No. 216. And further, that he could not recover for flowing any part of lot No. 21, as surveyed by the commissioners, whether it were included in the lines of 216 or not.

And it should also be remembered, that neither of these parties proved any title in their respective grantors, except so far as a title may have been derived from possession under their deeds.

The defendant first attempts to derive a title from Fasset, through the Waldo's and Chilson; but his deed from Chilson conveys only lot No. 21, as run by the commissioners. The court gave to the deed all the effect which the defendant could desire, and the jury have found that the flowing complained of was not upon that lot.

He then resorts to his deed from G. Waldo, dated in 1824, and contends, that although the deeds from G. Waldo to Chilson, and from Chilson to himself, convey only lot No. 21, yet that G. Waldo had acquired by his deed from A. Waldo a more extensive right, and that what was not conveyed to Chilson remained in Waldo until he conveyed to the defendant in 1824.

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To say nothing of the effect of the plaintiff's adverse possession of the land, at the date of this deed, we will proceed to inquire what rights remained in G. W., after his conveyance to Chilson.

And in the first place, I repeat, there was no evidence of any title in A. Waldo, or Fasset, his grantor, to any thing more than lot No. 21. The case states, that Fasset, as early as 1798, was in possession of lot No. 21. And what did he convey to A. Waldo? Simply a part of lot No. 21;—unless indeed the following part of the description, viz: "*thence continuing to run in such direction as to include a mill yard, and the whole of a mill pond, which may be raised by a dam on said falls, to a road,*" &c. is understood to include other land. If it be so understood, the question may be asked, whence did Fasset derive his title to that other land?

It is argued, however, that although no title is shown in Fasset, or possession in fact, of any thing more than No. 21, yet this deed would give a definite extent to Waldo's possession; and that, if he had possession in fact of any portion of the land described by this deed, he was constructively in possession of all. That such would be the effect, so far as the land was actually covered by the pond, is readily conceded; and so far the defendant had the full benefit of his doctrine; for the jury were told, that so far as the defendant or his grantors had flowed the land, before the plaintiff took possession of it, so far he had the right to flow it afterwards. To hold, however, that this vague description would give a right to flow the land, to an indefinite extent, at any future period, would be carrying the doctrine of constructive possession too far. This doctrine goes upon the ground, that a deed recorded gives to a possession a definite limit and extent. This description is altogether vague and indefinite. Besides, no action could be maintained against Waldo upon the ground that his neighbor's land was exposed to injury under this grant; and as no action could be sustained by the owner, under such circumstances, so no right would be acquired against him. It is apparent then, that neither A. Waldo, nor his grantee, G. Waldo, whose deed contains a similar description, could derive any right under that clause, further than

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they had actually occupied the land, by flowing it. Gershom Waldo had therefore nothing remaining in him, after his conveyance to Chilson, which would pass to the defendant by the deed of 1824, unless indeed it be a possessory right to land actually flowed, the right to which was conceded to the defendant, by the charge to the jury.

It is further insisted, that the court erred in the view which they took of the question, as to the east line of No. 21.

Admitting, for the present, that the early deeds gave a constructive possession as far east as the original line of that lot, which is by no means apparent on the face of the deed, yet a review of the history of the case will furnish a ready answer to all claim of right derived from that source. The deed from Fasset to Waldo is dated in 1805—that from A. Waldo to G. Waldo in 1818. No title is shown in Fasset, nor does the case show any possession in fact under these deeds, until Chilson took possession under the Waldo's in 1810. In 1812, the commissioners appointed to re-survey the town, and settle the boundaries of the several lots, completed their doings, and it is admitted, that they in fact altered the east line of 21, to give room for the plaintiff's lot, which was originally a pitched lot. The question as to the contested lines then arose for the first time. Whether the doings of these commissioners were of sufficient authority to divest the title, if any had been previously acquired, it is not necessary to decide. When Chilson, who it seems took possession under a contract to purchase, took his conveyance, he was limited to lot No. 21, *as run by the commissioners*. Whatever then might have been his previous claims, they were limited and defined by that deed, which, being recorded, was notice to all the world, to the plaintiff as well as others, that he claimed only the lot, as the commissioners had made it. He could have no constructive possession of any thing more thereafter, and any previous claim to any greater extent was *ipso facto* abandoned by the acceptance and recording of that deed. It is very clear, that his constructive possession could not transcend the limits specified in his deed; and, although an actual possession afterwards might have extended his claims, yet no actual possession up to the original line, subsequent to the return of the commissioners, was proved, or attempted to be proved.

The testimony of Chilson, on this head, was altogether inadmissible. It is clear, that no previous possession would affect the question, as to his acquiescence in the doings of the commissioners, and that nothing short of an actual possession afterwards, to

the original line, would counteract the effect of the deed. That effect, as to any legal or constructive possession, was a question of law; and not a proper subject of parol proof.

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The deeds from Waldo to Chilson, and from Chilson to the defendant, show an acquiescence, by all parties, in the decision of the commissioners.

It is however argued, that the expression, "as run by commissioners," does not apply to No. 21, but to lot No. 206, a part of which is conveyed by the same deeds. The description in the deeds is, "seventy acres of lot No. 21, belonging to the right of S. Avery, and thirty-five acres of lot No. 206, belonging to the right of Moses Goodman, as run out by the commissioners for completing the division of Enosburgh."

By the ordinary rules of grammatical construction, the expression applies to both lots collectively. The commissioners defined both lots; and, if the parties had intended No. 21, according to the old lines, and No. 206 according to the new, they would doubtless have designated. Further, it does not appear that the commissioners altered the lines of No. 206, but did alter those of 21. The expression is therefore of no importance, except as applied to No. 21.

But perhaps a more satisfactory criterion, by which to determine this point, is the intent of Waldo, if it can be ascertained. Did he intend to submit to the decision of the commissioners? or did he intend to reserve to himself his ancient claim, according to his deed from Fasset.

There is no evidence of any intention on the part of Waldo to retain any portion of the land, or any interest in it, after the conveyance to Chilson; nor is there any ground to infer such intent. Of what service could it be to him, to retain the uncertain claim for the land, to be covered with water? If covered, it could be of no use to him, and if not, the reservation would derogate from his grant. Nor is it to be presumed, that he intended, by reserving the strip of sixteen rods wide, to interfere still further with the enjoyment of the mill site.

But a consideration still more decisive is, that it is apparent from all the deeds, that the parties understood, that precisely the same land was conveyed by all the descriptions adopted. Fasset's deed to A. Waldo describes the land, after giving metes and bounds, as "105 acres, 70 acres to the right of John Avery, and 35 to the right of M. Goodman." That from A. Waldo to G. Waldo describes it by the same metes and bounds, omitting the expression

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above quoted. G. Waldo's deed to Chilson, and Chilson's deed to defendant, describe it as, "70 acres of No. 21, belonging to the right of J. Avery, and 35 acres of lot No. 206, belonging to the right of M. Goodman, as run out by the commissioners," &c.

It is obvious then, that Waldo did not intend to reserve any part of his purchase, but to acquiesce in the doings of the commissioners, and to waive any uncertain claim, derived from a constructive possession. All that G. Waldo could have was an inchoate title, arising from the possession of Chilson, and as to this, the effect of his deed to Chilson has been already noticed.

Further, Waldo's possession is to be considered with reference to his deed from A. Waldo. From the description in this deed, compared with the plan, it is evident that the eastern boundary, (except the circuit around the imaginary pond,) must lie further west than the east line of No. 21. None of the deeds profess to convey the whole of No. 21, nor to the eastern line as originally allotted. There is then no evidence of any title in G. Waldo to the east end of No. 21, nor *any* thing upon which a constructive possession to that extent can be founded. It is clear then, that Waldo had nothing remaining in him, to be conveyed to the defendant, by his deed of 1824, and that Waldo himself so understood it.

Again, it is argued, that the testimony of the surveyor should have been received, tending to show, that the commissioners intended to place the east line of No. 21 where it was originally located. The principle upon which the court proceeded is too well settled to admit of discussion. When the original monuments are found, no testimony can be received to show that the surveyor intended to locate the boundaries elsewhere. Were it otherwise, the boundaries of the whole state might be disturbed. A single error in the allotment of a town might lead to a new allotment throughout; and if ancient landmarks are to be disturbed, upon this principle, there would be no end to the consequences.

The testimony of the surveyor, as to the declarations of House, was clearly inadmissible, on two grounds. In the first place, the declaration was not binding upon him, if made; and in the second place, it could not affect the right of his grantee. It was not an admission going to qualify his possession, but the expression of his purpose, or intent, which could not derogate from the estate conveyed by him.

The circumstance that House witnessed the deed from Fasset to Waldo, is of no importance. It does not appear, that the claim

set up by the plaintiff in this case, conflicts with that deed, and if it did, the proceedings of the commissioners, with the assent and acquiescence of the parties, would render such claim consistent and proper.

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Upon the whole, we see no error in the proceedings of the county court, and their judgment is affirmed.

PROBATE COURT for the DISTRICT OF GEORGIA, J. DOANE PROSECUTOR, vs. CAROLINE CHANDLER and J. L. CHANDLER.

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In an action on an administrator's bond, to an assignment as a breach, of the non-payment of a debt allowed by commissioners, the statute of limitations is not a good plea.

This was an action of debt on a probate bond, commenced in the county court, and came here upon exceptions taken by the defendant to the decision of the court below, sustaining the plaintiff's demurrer to the defendants' plea of the statute of limitations. A further statement of the case is incorporated into the opinion of the court.

Hunt and Beardsley for plaintiff.

Smith, Smalley and Adams, contra.—The defendant contends, that this is virtually an action of covenant. Any words in a deed, which show an agreement to do a thing, make a covenant. In order to constitute an express covenant, the law does not require any precise and technical language.—Comyn's Digest, Cov. A. 2. Platt on Cov. 13, and authorities there cited. *Duke of St. Albans vs. Ellis*, 16 East. 351. 2 Com. 224. *Swett vs. Morris*, Bur. 237. *Hill vs. —*, 1 Cas. in Chan. 293. *Stewart vs. Walbridge*, 23 C. L. R. 262. Platt, 15, 16, 62.

It must be admitted, that this action, created by statute, is *sui generis*; but it is clear that the prosecutor does not sue for the penalty which is given for the benefit of all concerned in the estate. There is no stipulation in the bond to pay the penalty to any but the probate court; and the judgment for the penalty follows the bond in favor of the probate court. After judgment has thus been entered on the bond, the prosecutor's action commences, not for the recovery of a debt, *eo nomine, et in numero*, nor is his action

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necessarily restricted to damages for the detention of a debt.—1 Chit. 105, 100, 110. His demand is emphatically for unliquidated damages, which he may have sustained by the administrator's neglect to execute his office, rather than for a sum certain as in debt. If he recover at all, he must recover such sum as the jury shall assess in damages. To treat his action as an action of debt, therefore, would be to confound all distinction between debt and covenant.

The action of the prosecutor has all the characteristics of an action of covenant. By resorting to the bond, he does not rely upon the implied obligation of the administratrix to answer for the contracts of the intestate, but seeks to recover damages for the breach of the express engagements which she and her surety have made and entered into under seal. What then is the prosecutor's action, but an action of covenant?

2. The claim which the prosecutor is endeavoring to enforce in this suit is, a judgment of commissioners, for which he might have his action of debt against the administratrix of the estate. This debt is barred by the statute of limitations, and the bond being but collateral and incidental to the debt, must follow its principal. The bond is intended to secure a subsisting debt, but not to revive a stale demand or perpetuate a liability. On general principles, and the reason of analagous cases, it would seem absurd to hold that the plaintiff's claim was taken out of the operation of the statute of limitations by the mere form of this bond.—Stat. 290, sec. 8. *Bates vs. Kimball*, 2 D. Chip. Rep. 77.

Thus a bond given to secure a void contract is inoperative.—Com. Dig. Obligation A. Platt on Cov. 248. So a bond given as an assurance for covenants is avoided by the release of the covenants. A surety cannot be holden beyond the extent of the liability of the principal. Nor can a mortgage of real estate be enforced, when the debt which it was intended to secure is barred by the act of limitations.—Theobald on Guar. 2. *Jackson vs. Sackett and Raymond*, 7 Wend. 94.

This case, if not within the letter of our act of limitations, is clearly within its spirit.

3. Whether the action be deemed an action of covenant on the conditions of the bond, or debt on the judgment of commissioners, or *sui generis*, it is within the operation of the act of limitations, and has been so adjudged by this court.—*Probate Court vs. Miller*, decided in Chittenden county, in 1829.

The opinion of the court was delivered by

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PHELPS, J.—This is an action of debt, upon a bond executed by the defendants to the probate court, conditioned, in the usual form, for the faithful execution, by one of the defendants, of the duties of administrator of the estate of B. Chandler, deceased. Judgment having been rendered, in pursuance of the statute, for the penalty of the bond, the prosecutor assigns as a breach of the bond, the non-payment of a debt due from the intestate to himself, which debt appears to have been duly allowed by the commissioners on the estate of Chandler, which was represented insolvent. The allowance was made on the 10th day of June, 1819, and this action was brought in July, 1829. The defendants plead "*actio non accrevit* within eight years, and the plaintiff demurs.

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Is the prosecutor's remedy barred by any statute of limitations?

It is not contended that any statute of limitation applies in terms to bonds of this description. But it is insisted, that the prosecutor has other remedies for the collection of his debt, to wit, an action of covenant or debt upon the adjudication of the commissioners, and that the statute having run upon these remedies, this proceeding is also barred.

The counsel are clearly mistaken in supposing that covenant will lie in this case. However liberal the common law may be, in allowing an election to bring debt or covenant upon a sealed instrument, there is an insuperable difficulty in this case in sustaining the action of covenant. The prosecutor is not a party to the bond, and at common law could have no remedy upon it. His remedy is by force of the statute alone, and being so, must be sought in the mode pointed out by the statute, and in no other.

He might perhaps sustain an action of debt upon the allowance of commissioners, and if so, the statute of limitations might under circumstances be a bar; yet in such a case, the statute would begin to run, not from the date of the allowance, but from the period when, in the course of administration, the administrator became chargeable for a default. But it does not follow, if such action of debt is barred, that the remedy here sought is barred also. The remedies are different, and are against different parties; and although a discharge of the principal is a discharge of the surety also, yet it remains to be established, that an extinguishment of one of several collateral remedies is either an extinguishment of all, or a legal discharge of the debt.

There is certainly no statute of limitation applicable to bonds of this description, and it is clear, from the statute directing the pro-

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ceedings in this case, that no such plea can be interposed to bar a judgment for the penalty. If so, it is equally certain that no such plea can be interposed between the judgment for the penalty and the assessment of damages. The law allows no execution to issue for the penalty in any such case; and it would be absurd to give a remedy so far as to allow a judgment for the penalty, and yet interpose an arbitrary statutory bar to render that remedy nugatory.

The statute of limitation has immediate reference to the action, and operates upon the cause of action only indirectly and consequentially. Its language is, "No action of debt, &c. shall be brought," &c. The debt is not extinguished, but is indirectly and in effect barred by taking away the appropriate remedy. So long as such remedy may be had, the debt subsists, and whenever there are collateral remedies for the same thing, the statute can have its full effect upon the debt only when all appropriate remedy is denied. Hence it has always been considered, that ejectment can be sustained, although the remedy by personal action for the debt may be barred by the statute. I am aware that a learned judge of a neighboring state has advanced a different doctrine; but I believe that opinion has no precedent to sustain it, and I know not that it has in any subsequent case been adopted.

The manuscript case of *Catlin vs. Miller*, cited by the defendants' counsel is not analogous to this. That was an action on an executor's bond, and the prosecutor in assigning breaches adopted the common law form of declaring against an executor. The assignment of breaches was in form and in substance a declaration in assumpsit against the executor, upon promises of his testatrix, setting forth a promise by the testatrix in her life time, and alleging non-payment, by her in her life time, or by the executor afterwards. The claim had never been allowed by commissioners, or otherwise established against the estate. It is obvious that if such a declaration can be sustained at all, the case was open to any defence by the executor, which would have been proper, had the action been assumpsit against the executor in the English form. It was necessary, in order to show a breach of the bond, to establish the debt, and this opened the case for all defences. The statute, having begun to run during the life of the testatrix, continued to run, notwithstanding her decease.

The case of *Jackson vs. Sacket*, 7 Wend. 94, is cited, as showing that ejectment cannot be sustained upon a mortgage, after the statute has run upon the notes to which the mortgage was collateral. The case does not warrant the position. The statute was

not pleaded, nor was it held that such a plea would be good. The defence was, payment of the debt, and the lapse of time, with other circumstances, was left to the jury as a ground of presumption that the debt was satisfied. Of the propriety of this there can be no doubt. So in this case, the lapse of time would have been proper for the consideration of the jury, under a similar plea, and, under circumstances, would have justified a verdict of payment. We are agreed that this is the only legitimate use to be made of it, and that it is not a statutory bar.

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Fuller.

Judgment of county court affirmed.

GRAND-ISLE COUNTY.

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PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*
 " " SAMUEL S. PHELPS, } *Assistant Justices.*
 " " JOHN MATTOCKS, }



GRAND ISLE, UNITED STATES BANK vs. DANIEL T. TAYLOR, JOHN M. SOWLES,
January, and BENJAMIN MOTT.
 1835.

An officer attaches property, from time to time, on a writ, and leaves a single copy, agreeably to law, including a list of all the property taken, before the time of service expires—*Held*, Such service is good on a plea in abatement.

This was an action of assumpsit on a promissory note, to which a plea in abatement was made, as to the sufficiency of the officer's return, which stated that, at sundry times, from the 7th day of Nov. 1833, to the 17th day of April, 1834, said officer attached divers articles of property, and at the latter date alone had left a copy, including in the return a list of all the property attached, for the defendant, with William L. Sowles, at his dwelling-house in Alburgh; and stated that said defendant had no residence or attorney in this state, and where left being the place nearest where most of said property was attached, &c.

The county court overruled the plea, to which the defendant excepted, and the cause passed to this court for revision.

Mr. Harrington for defendant.—One question, which involves the whole inquiry, is, at what time the officer serving this should have delivered the defendant, Taylor, a copy of the writ and return. The statute is, "when the goods and chattels of any person shall be attached at the suit of another, a copy of said attachment and a list of the articles attached, attested by the officer serving the same, shall be delivered to the party whose goods and chattels are so attached," &c. It would seem that a conclusive answer is given by the statute as to time, and that is, when the goods are attached; so

it would be bad to take property at one time, and at another to furnish the copy. The service of an attachment must be completed at one time; that is, must be proceeded with with ordinary diligence, until the property is secured and copies made and delivered to the defendant.

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Intermitting services could never be endured. Every defendant ought to know by what authority and for what purpose his property is taken from him, that it may be receipted or replevied as the circumstances should require; and the only legal and proper course to give this notice is, by copy.

Mr. Read contra.—The plaintiff contends that the said Taylor's plea in abatement was properly overruled by the court below—

1. Because said plea in abatement is bad upon the face of it.
2. Because the service *was* made and copy left, agreeably to the provisions of the statute, in cases where the defendant is not an inhabitant of this state, and his goods and chattels being within this state, are attached.—Stat. 65.
3. Property may be attached by an officer, from time to time, until the service is completed; and if he leaves a copy at any time before the time of service expires, it is good.—*Newton vs. Adams and others*, 4 Vt. Rep. 444.

The opinion of the court was delivered by

MATTOCKS, J.—It seems doubtful, from the plea in abatement, whether it is intended to be in behalf of all the defendants, or only for Taylor. But as we think the plea has no substance, it would be useless to examine the form. It is not obnoxious to the defect of being double, as neither of the two causes alleged are sufficient. The one that the copy was not left with Taylor, but with Sowles, who was no agent, is bad; because the statute, p. 65, provides, that where the defendant is not an inhabitant of this state, and has no known agent or attorney, the copy is to be left where the property was attached; and the officer's return shows, that, at the time of service, all these facts existed as to Taylor, and the copy was left according to the provision of the statute. As to the other fact in the plea, that the property was attached on the 7th November, 1833, and at sundry other times, until the 17th March, 1834, when the copy was left. This last day being more than twelve days before court, was sufficient, as was decided in *Newton vs. Adams et al.*, 4 Vt. Rep. 444, where the judge, who delivered the opinion says, "The law requires but twelve days notice in such

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cases, and it makes no distinction in this respect, where property is attached or otherwise." It would be very inconvenient, when a creditor is unable to secure his debt, except by snatching morsels at a time, if copies must be left in each instance; but if the creditor should wantonly harrass a debtor in that way, it would be an abuse of legal process.

Judgment of county court affirmed.

GRAND ISLE,
January,
1836.

STATE vs. OLIVER B. BREWSTER.

An offender, escaping into Canada, and brought back, against his will, and without the assent of the authorities of the province, may yet be tried and punished for the offence committed here.

If stolen goods are found in the possession, or under the control of the prisoner, it is a question for the jury, how far, under all circumstances, that possession raises a presumption of guilt in the particular case.

This was an indictment in two counts:

1. For burglary in the shop of one Brown, and stealing leather and cloth from the same.
2. For stealing leather.

The respondent, on being arraigned, interposed a motion to be dismissed, on the ground that he was forcibly, and against his will, brought from Caldwell's Manor in Canada, the place of his residence, by citizens of this state, for the purpose of being prosecuted for the offences aforesaid. Evidence was received by the court in support of this motion; but having failed to prove the facts alleged, respondent moved for liberty to plead in bar of the indictment the same or like facts as those contained in the motion. This application was refused by the court, under a rule that respondent should be at liberty to file such a plea in the supreme court, if that court should deem the matter pleaded legally available. Whereupon, he pleaded, not guilty. Evidence was given by the state, showing, that on the night of the 13th of August, 1834, the shop of said Brown in Alburgh was broken, and the cloth and leather aforesaid were missing therefrom; that immediate search and pursuit were instituted, and that fresh tracks of two horses were traced into the vicinity of the respondent's house, in Caldwell's Manor, in Canada; and that the cloth was found concealed in a thicket, not far from the house of one Lucas. The respondent offered to

prove the admissions of Lucas, that he alone put the cloth there. But the court rejected the evidence. The government then offered to prove certain admissions of the respondent, tending to show him directly concerned in the burglary and theft. But on hearing evidence of the circumstances under which they were made, the court rejected the proof, on the ground that the admissions were made under the influence of threats and promises of favor. The government then offered to prove, that on the same occasion, the respondent proposed to the company collected at or near his house, that if he might be permitted to select three men of the company, he would go with them and show where the leather might be found; and that this offer being accepted he went and pointed out the spot where it was found concealed. This was objected to by the respondent, but admitted by the court. The proof then showed, that respondent led said persons across his fields about eighty or one hundred rods, and in the edge of the woods pointed out two logs, between which he said they would find the leather, and they found it there, closely concealed. All these facts transpired in the course of the day after the property was taken from the shop. The respondent resided about seven or eight miles from the shop. It was contended, on the part of the respondent, that this evidence was not of a character to warrant a verdict of guilty, because it did not prove a finding of the property upon the respondent, or in his possession. The court instructed the jury, that if on a due consideration of all the facts and circumstances in evidence, they should be of opinion, that the respondent's having discovered where the leather was concealed furnished equal evidence of his having stolen it, as if it had been found about his person, or in his house, they would be warranted in returning a verdict of guilty; he having given no explanation on the subject; but if they thought the evidence not equal to such finding on his person, or in his house, they ought to acquit him. They were advised to acquit the respondent on the first count, on the ground, that the presumption against him, arising from the evidence, (if any was to be made,) would be a presumption of theft, but not of the higher offence of burglary. Verdict of not guilty on the first count, and guilty on the second. To these decisions, and to the charge of the court, the respondent excepted; and the exceptions were allowed and passed to this court.

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A. G. Whittemore for respondent.—1. The respondent ought to have been permitted to plead the facts set forth in his motion,

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because such conduct will tend to disturb the harmony which ought to exist between this government and Canada. Such conduct towards our government would never be tolerated by the United States. Another nation would not submit any sooner than this.

There is no necessity to countenance this violent mode of proceeding. On application and proof to the authorities of that government, the defendant would have been delivered up. All nations have made provision for such cases, by lodging this power in the hands of their most responsible agents.

2. Ought the court, which is one of the great constituents of the government, to sit in judgment upon persons brought within their jurisdiction by a violation of the rights of a foreign nation? The court cannot take cognizance of the person unless legally brought within their jurisdiction, though it may have of the offence.

The charge of the court was incorrect—

1. Because the court instructed the jury to presume a fact, and from that fact to presume another. For instance, to presume from the prisoner's knowledge where the leather was, that he put it there, and from that presumption, that he must have stolen it.

2. The court ought to have instructed the jury that the prisoner's knowing where the leather was, did not furnish evidence equally as strong, as if it had been found on his person or in his house.

H. Adams for the state.—The plea attempted to be interposed, the validity of which the court are now called upon to determine, has none of the requisites of a plea.

1. It is not a plea in abatement.

2. It does not set forth any thing in justification or excuse of the offence charged in the indictment.

3. The plea then, if it have any effect, must be as a plea to the jurisdiction of the court, founded on the personal privilege of the prisoner.

The charge of the court to the jury was correct.

The opinion of the court was delivered by

PHELPS, J.—Whether the matter on which the prisoner relies is more properly the ground of a motion to dismiss, or the subject of a plea in bar, is a question of form merely, not important to our present purpose.

It is observable, that the case does not state, that the respondent was brought out of Canada, without the assent of the constituted authorities of that province. If such assent be presumed the case

becomes one of ordinary and common occurrence, and one in which, I believe, the practice of all civilized nations is the same. Whether there be any principle of international law, which requires of an independent sovereignty to surrender an offender fleeing from justice to its dominions, and if any, to what cases it applies, is a question not necessary to be discussed. The practice is general, (whether from comity, or otherwise, it is unnecessary to inquire,) to surrender such offenders, in aggravated cases; and when thus surrendered to the jurisdiction of that nation whose laws have been violated, it is, we believe, the universal practice to try, convict and punish. Such has been our practice, with respect to offenders reclaimed from other states, and from the province of Canada. This universal practice sufficiently shows, that immunity from punishment is not a legal consequence of having taken refuge in a foreign jurisdiction, to be claimed as a matter of right by the offender. If it were so, the act of such foreign government, in surrendering the offender, would be in itself improper, and could have no legal tendency to deprive him of this right. It is impossible to conceive any sound principle upon which such an immunity can be conceded to the offender. The idea that it could exist at all, probably originated in the difficulty with which offenders are reclaimed, and the extreme jealousy with which every nation guards its own dignity in this particular—a jealousy equally due to its own dignity and to the citizen under its protection.

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It is a well settled rule of international law, that a foreigner is bound to regard the criminal laws of the country in which he may sojourn, and for any offence there committed, he is amenable to those laws. In this case, the offence, if committed at all, was committed within our jurisdiction, and is punishable by our laws. The respondent, although a foreigner, is, if guilty, equally subject to our jurisdiction with our own citizens. His escape into Canada did not purge the offence, nor oust our jurisdiction. Being retaken and brought in fact within our jurisdiction, it is not for us to inquire by what means, or in what precise manner, he may have been brought within the reach of justice.

It becomes then immaterial, whether the prisoner was brought out of Canada with the assent of the authorities of that country or not. If there were any thing improper in the transaction, it was not that the prisoner was entitled to protection on his own account. The illegality, if any, consists in a violation of the sovereignty of an independent nation. If that nation complain, it is a matter which concerns the political relations of the two countries, and in

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that aspect, is a subject not within the constitutional powers of this court.

Whether the authorities of Canada would have surrendered the prisoner, upon due application, is a question of national comity, resting in discretion. Their power to do so will not be questioned. If they have the power to surrender him, they may permit him to be taken. If they waive the invasion of their sovereignty, it is not for the respondent to object, inasmuch, as for this offence, he is, by the law of nations, amenable to our laws.

Were this an attempt to subject the prisoner to the exercise of our jurisdiction, in a case not confessedly within it, the case would be different. Had the act been committed in Canada, however injurious to our citizens it might have been, the law of nations would have afforded a protection which this court would be bound to respect.

We are also of opinion, that the charge was correct. If stolen goods were found in possession of the prisoner, it is *prima facie* evidence of guilt. Whether they were to be considered as in his possession, and under what circumstances, was a question of fact; and how far those circumstances sustained or rebutted the presumption of guilt, was surely a question for the jury; and if they were satisfied that the presumption was equally strong, as if the goods had been found upon his person, or in his house, the consequence would be the same, and the proof of guilt equally satisfactory.

Judgment that the prisoner take nothing by his exception.

GEORGE MORTON *vs.* NATHAN WEBB.GRAND ISLE,
January,
1835.

If two writs be sued out on the same day, and both served at different times, the one first served will abate the other, but not *e. converso*.

A trustee action pending will not abate a subsequent suit in the common law form between the principal parties and for the same cause of action.

The non-joinder of a dormant partner as plaintiff is no ground of abatement, nor can it be taken advantage of on trial.

This was an action on book, to which the defendant pleaded in abatement, the pendency of a former suit for the same cause of action. To this the plaintiff replied, that the other suit referred to was a trustee or factorizing process, summoning certain persons as the trustees of the defendant, which writ was sued out on the same day with the writ in this suit, but not served until after the service of the writ in this suit. To this replication the defendant demurred. The county court adjudged the replication sufficient, to which the defendant excepted.

The case was referred to an auditor, who reported, among other things, that one S. B. was a secret or dormant partner with the plaintiff, and equally interested with the plaintiff in the claim in suit. The county court rendered judgment for the plaintiff, notwithstanding the objection that S. B. should have been joined in the suit, to which the defendant also excepted.

Harrington and Smalley and Adams for defendant.—1. The pleadings in this case show that two suits were commenced at the same time for the same cause of action. This is good cause of abatement of both actions.—1 Saund. P. & E. 19, and authorities there cited. Arch. Plead. 320.

2. From the report of the auditors, it appears, that Sidney Baldwin was partner with plaintiff, and jointly interested in this suit, and ought therefore to have been joined with plaintiff in the suit.—1 Saund. P. & E. 18.

H. Adams contra.—A general demurrer to a replication to a plea in abatement will reach to formal defects in the plea itself.

The plea in abatement is defective, because it is not alleged therein that there was another action *pending* when this writ was *purchased*.—5 Mass. Rep. 174, *Commonwealth vs. Churchill*. Year Book, 39, Hen. 6, 12 pl. 16.

The purchase of the writ may be considered at any moment of the day of its date, which will best accord with the justice of the case.—15 Mass. Rep. *Badger vs. Tenney*, 364.

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Every court has its own rule respecting what shall be considered the commencement of an action.—Ballentine on Limitations, 118.

In the action on book, a dormant partner cannot join as co-plaintiff in a suit to recover a debt due the company.—2 Vt. Rep. 65, *Boardman vs. Keeler and Allen*. 5 Vt. Rep. 116, *Hilliker vs. Loop*. 5 Mass. Rep. 174.

The opinion of the court was delivered by

PHELPS, J.—To some purposes the suing out of a writ is deemed the commencement of a suit, and to some purposes the service of the writ is the commencement. Still it is considered, under our practice, that a writ is under the absolute control of the plaintiff until served. He may suppress it if he choose, and, in general, no other person can have any interest in it until served. Then indeed it becomes a suit pending, and to some purposes has relation to the impetration of the writ. It follows, that the mere suing out of a writ, the same not being served, will not abate a writ subsequently sued out and served. If two writs be sued out at the same time, and one be served, it is not liable to be abated by a subsequent service of the other. But the latter suit is abatable. So it was in this case; the factorizing writ was abated by the pendency of this suit. But the reverse will not hold.

The pendency of a factorizing suit will not abate a common law suit between the principal parties, though for the same cause of action. The reason is, that the factorizing suit does not furnish the same remedy. By statute, if the supposed trustee has no effects, the suit fails altogether. In such case, therefore, it gives no remedy against either the person or property of the debtor. The reason of the rule, that the pendency of a suit will abate another action, for the same cause, and between the same parties, is, that the second suit is unnecessary and oppressive. Such however is not the case, where the first suit is a factorizing or trustee process.

As to the other objection, that S. B. should have joined in the action, it is sufficient to say, that the rule is well settled, that a dormant or secret partner need not join in a suit for goods sold, and by parity of reasoning in the action on book. The non-joinder in such case is no cause of abatement, and if not, it certainly cannot be taken advantage of on trial.

Judgment affirmed.

ADDISON COUNTY.

JANUARY TERM, 1835.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*

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| " | " | STEPHEN ROYCE, | } <i>Assistant Justices.</i> |
| " | " | JACOB COLLAMER, | |
| " | " | JOHN MATTOCKS, | |

MIDDLEBURY, NEW HAVEN and BRISTOL vs. AZARIAH ROOD.

ADDISON,
January,
1835.

Where a note was given to the selectmen of three towns, and prosecuted to final judgment in the name of said towns, under the directions of a special agent appointed by one of said towns, and the money collected and paid to said selectmen by the sheriff—*Held*, That said selectmen were not authorized to receive said money and to discharge the sheriff.

The authority given by the statute to the selectmen over the prudential affairs of the town, does not authorize them to receive the moneys of the town and execute discharges therefor.

This was an action against defendant, as sheriff, for not paying over money collected on an execution. Trial by the court.

The facts were, that a note of hand was given by one Case to the selectmen of the towns of Middlebury, New Haven and Bristol, which was prosecuted to final judgment in the name of the plaintiffs, by the direction of a special agent of the town of Bristol. No special agent was appointed by either of the other towns. An execution issued on the final judgment recovered at the last term of the supreme court in this county, for \$137 67 damages, besides the cost, and was put into the hands of the defendant, within the life, who received the money upon it. It also appeared, that after the commencement of this suit the defendant paid to the selectmen of Middlebury, two of the selectmen of Bristol, and two of the selectmen of New Haven, the full amount of money received on the execution, and on that occasion the said selectmen executed to the defendant the following discharge:

"Received, May 31, 1834, of Azariah Rood, sheriff, \$166 79, in full satisfaction of an execution in favor of the towns of Mid-

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dlebury, New Haven and Bristol, against Nathan Case, issued on a judgment of the supreme court, January term, 1834; and we hereby discharge the suit commenced against said Rood on account of said execution, and direct the said suit to be discontinued."

This discharge was signed by the three selectmen of Middlebury, two of the selectmen of Bristol, and two of the selectmen of New Haven.

This discharge was objected to by the plaintiffs, but the court decided that it was good and available in law to the defendant, and thereupon rendered judgment for the defendant, to which plaintiff excepted, and the exceptions were allowed and certified.

Linsley and Chipman and Bradley for the plaintiffs.—1. The discharge of the selectmen is wholly inoperative. No town officer can discharge any debt, except by receiving the money. If the debt is to be discharged without payment, it must be by a vote of the town. The payment of the money then, being essential to the validity of the discharge, it is equally essential that the payment be made to some one authorized *by law* to receive the money. The treasurer is the only officer authorized by law to receive and pay out the monies of the town. His duties and responsibilities are clearly fixed by law, and peculiar and appropriate remedies and ample security are provided by statute for the town. The duties of the treasurer of a town being thus clearly defined by the statute, no other officer can exercise the power conferred upon him, unless clearly and expressly authorized by the statute. The court will not give this power, thus given to the treasurer, to another officer, by implication. It is obvious, that to have the monies of the town paid to several and distinct and separate officers, keeping no common accounts, would produce irretrievable confusion, and it is impossible to believe that it was ever designed to produce such a result. Besides, the legislature, by the provisions of the statute requiring the treasurer to give bonds, &c. have shown what precautions they supposed necessary for the security of the town against those authorized to receive the public money; and having provided no such security for the town from the selectmen, the inference is irresistible, that they did not contemplate that they would be entrusted with the common funds. The treasurer is appointed for the sole purpose of doing what, in this case, the selectmen have attempted to do for him; and in doing it, they have clearly departed from their sphere, and invaded the rights of another department; and in doing this, they offer none of the safeguards to

the town which the law requires from the officer charged with this duty.

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The treasurer then, it is insisted, is the only officer authorized by law to receive and disburse money for towns.

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2. But whether this be so, or not, it is clear that the selectmen are not clothed with this power.

(1.) The duties of the selectmen are, "to superintend the prudential affairs of the town." This general definition is obviously loose, but if nothing else was to be found in the statute, all the power that could with any show of reason be given them by this section of the statute, would be to permit them to do those acts which were obviously prudent and necessary for the town to have performed, and which could not come within the appropriate duties of any other officer.—Comp. Stat. 410, sec. 3.

(2.) The legislature have not left it doubtful how "prudential" should be construed. They have proceeded to point out minutely their duties. They are to take bonds of the constable, warn meetings, make up taxes, lay out roads, superintend roads, bridges, &c. But they are not under the pretence of superintending the prudential affairs of the town, to perform the duties of the constable or town clerk, or remove the deposits from the treasury, or intercept the money in its way to the treasury.

By the constitution of the state, the legislature are undoubtedly interested with the superintendence of the prudential affairs of the state, and yet they are not authorized to receive a dollar. They can borrow and appropriate money, and levy taxes—their powers far exceeding those of selectmen—but they are not authorized to receive money.

Wherever the powers of selectmen have been judicially considered, courts have strongly intimated that their authority was limited to a narrow sphere. They cannot discharge a witness.—*Angel vs. Pownal*, 3 Vt. Rep. 61.

(3.) Selectmen are special agents, and their powers are limited by statute, which points out their duties. This subject was fully discussed and ably illustrated by Judge Hosmer, in *Griswold vs. Stonington*, and it was decided that they could not submit a suit. 5 Con. Rep. 371.

(4.) Their acknowledgment that a person is a pauper, is no evidence.—1 Day, 183.

(5.) They cannot by accord take away the rights of the town. 2 Day, 323.

(6.) They cannot, without a vote of the town, commence a suit.

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3. The town of Bristol has appointed a special agent for the sole purpose of managing this business, and his having the note may be considered as evidence that he acted as agent with the consent of all the towns.

The selectmen of Bristol, who are the agents of the town for special purposes, cannot supercede the special agent appointed for this purpose, and take the business out of his hands.

4. All the selectmen of the towns of New Haven and Bristol have not joined in the discharge. The selectmen or a majority are not authorized to act. They must all concur to give validity to their proceedings.

Starr and Bushnell for defendant.—The discharge executed by the selectmen of the three towns to the defendant, on the receipt by them of the whole sum of the execution in favor of the towns against N. Case, was a valid discharge to the defendant.

1. The selectmen are appointed “to superintend the prudential affairs of the town.”—See Rev. Stat. p. 409. They are the general agents of the town. They are, *ex officio*, overseers of the poor, unless other overseers are appointed. They are also trustees of schools, *ex officio*, in conjunction with others appointed by the town; and as such trustees, they are expressly empowered “to commence, prosecute and defend any suit or suits, action or actions, for or on account of any money or other estate, belonging to, or in any wise appertaining to such schools.” See Rev. Stat. pp. 589, 432 and 433. Various special duties are imposed on them by particular special statutes. They are so entirely the agents of the town, that, for all their official acts, for which a right of action accrues to any one, the town is subjected to the action; and in all cases where an action is given by law to the selectmen, “it must be brought in the name of the town.” See Rev. Stat. p. 159. As they are to take charge of the property of the town and secure the same from loss, they must have the right to commence suits and also to stop or discharge them on payment of the debt or sum due.—1 Chip. Rep. 378. — vs. *Webber*, and note, 456.

2. Nor does it make any difference that the town of Bristol had appointed an agent “to look up this money.” He had no authority to act for Middlebury or New Haven, and he could take no step without their concurrence, no more than a selectman can act for the whole board of selectmen and bind the town by drawing orders, &c.

3. The tender of sixty dollars was more than the whole taxed bill of cost. The bill of costs was only \$29 47, and the lien of

the attorney attaches only to the bill of costs.—2 Aik. Rep. 162, *Hart vs. Chipman and Bates*. 5 Bos. and Pul. 100, *Swain vs. Senate*. 6 T. R. 361, *Reed vs. Dupper*.

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MATTOCKS, J.—The question in this case is, whether the selectmen had competent authority to receive the money and discharge the debt; and this involves in the first place the question, whether they have such a general power or authority by virtue of their office, and secondly whether they had it under the circumstances of this particular case.

It is not known that there has been any particular decision that reaches the first branch of the question. In *Angell vs. Pownal*, 3 Vt. Rep. 61, it was decided that the selectmen could not, without a vote of the town, discharge the interest of a witness, but that was a discharge without payment. In Connecticut, where the statute, as it relates to the duties of selectmen, is very like ours, it has been decided that they cannot, without a vote of the town, commence or refer a suit, nor accept of an award and satisfaction. But whether they can receive the money and cancel the debts due to the town, has hitherto been undecided. That it is the appropriate duty of the town treasurer to keep and receive the moneys of the town, and that payment to him is payment to the town, there is no doubt; and the statute requiring him who is to keep, and the collector who is to gather the money, to give bonds, and it being required of no other town officer, affords a strong argument that these two and no others were intended to be made the fiscal officers of the town. For this there would seem to be good reasons. It is but the common precaution in relation to most corporations, public or private. The selectmen may be discreet fathers of the town, yet be or become poor. They are not, like a president of a bank, appointed for their wealth; and if one set should happen to be defaulters, the next might collect it of them, and not pay to the treasurer, and so indefinitely, before the money would arrive at its final destination; and although it would be rare that they would squander town money, yet where the funds are considerable, if they could control them, it might happen; and unless the law by fair implication at least gave them the right contended for, it would be more safe not to decide that they have it.

The statute relating to town meetings directs that three or more persons, not exceeding five, be appointed as selectmen, “to superintend the prudential affairs of the town,” and who are to be over-

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seers of the poor, if none others are appointed; and in various statutes particular acts and duties are required of them as selectmen and overseers of the poor; but among these, it is believed, that of prosecuting or defending suits, or of collecting or receiving money, is not to be found. Suits are directed to be prosecuted or defended by agents appointed by vote of the town, and all suits where by law an action had been given to the selectmen, among others, are by the act of 1817 directed to be brought in the name of the town, depriving them from being even nominal parties. The act for the support of schools indeed appoints the selectmen, and a trustee to be appointed by the town, trustees of schools, with power to lease lands and lend the money; but this is a distinct board from the selectmen merely, with particular powers conferred; and this being the only instance in which the selectmen, even with another, are entrusted with the abiding care of funds, and in this case there being a standing trustee joined with them, is rather an argument against them for the power of the selectmen, as such, to receive money. But it is insisted, that this power is conferred by the words, "to superintend the prudential affairs of the town." This general purpose of their appointment is contained in the very clause directing them to be appointed, and afterwards particular acts and duties are enjoined. Perhaps these specified duties may be regarded as what is meant by "prudential affairs." If not, the broadest construction would seem to comprehend no more than all those undefined acts and doings that are necessary and convenient to have done in the management of the affairs of the town, which it is not made the duty of other officers to do—every thing that is no one's business in particular to do—that is, to do the chores of the town. But it is the proper business of the treasurer to receive and keep the cash of the town, and therefore it is not comprehended by this general expression.

We think, therefore, that the power in question is not given to the selectmen, either expressly or by necessary implication, and therefore they have it not.

There is nothing in this case, that will distinguish it, favorable to the defendant. It does not appear, that the selectmen of any of these towns took the note which was sued, or ever had any actual agency in the matter; but the suit was prosecuted by a special agent appointed by the town of Bristol, and after final judgment, and the money had been collected upon the execution of the defendant, the sheriff, in lieu of paying the money over to the attorney or agent, saw fit to pay it to the selectmen of these towns.

There is no doubt but that there may be cases in which, when the selectmen having been entrusted by the town to take or hold securities, the receiving the money upon them and giving them up to be cancelled, would be an extinguishment of the debt. But here was no implied agency. Their interference was entirely gratuitous, and intended to be official, and it not being within the scope of their general authority, the discharge they gave was of no effect.

Judgment of county court is reversed.

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WILLIAM H. WHITE vs. CYRUS BOOTH *et al.*

(*In Chancery.*)

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The erecting and using a church on lands to which a party has a doubtful claim, for which he has commenced his action of ejectment at law, is not such a nuisance or waste as to entitle him to the interposition of this court in granting an injunction.

This was a bill in chancery, praying for an injunction. The substance of the bill and answer is sufficiently presented in the opinion of the court.

P. C. Tucker, for the orator, cited Treatise of Equity, 10—15. Fonblanque, 23. 1 Maddock's Chancery, 126, 159—60. *Pope vs. Carl*, 2 Atk. 342. *Smith vs. Cook*, 3 Atk. 381. *Pomeroy vs. Mills*, 3 Vt. Rep. 413. Bac. Abr. 651. 2 Brown's Chan. Rep. 125. 2 Harrison's Chancery, 182. Hardress, 96.

The opinion of the court was delivered by

MATTOCKS, Chan.—The bill states, that the orator is the grantee of several lots of land, within the original charter limits of the town of Ferrisburgh, and that he holds title to said lands by several legal conveyances from the proprietors of said town, and is thereby entitled, as he is advised and believes, to a share or shares of any undivided lands in said town, which may yet remain therein, or which may have heretofore reverted in any manner since the supposed final division in said town;—that in May, 1785, a proprietors' meeting was held in said town, when it was voted, that the "town plot," so called, now the city of Vergennes, be laid out as No. 84 in said town, near New Haven falls;—that in Oct. 1786, another meeting was held, when it was voted, that the plot afore-

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said should be divided into three divisions, at the discretion of a committee appointed for that purpose, and they should be allowed in said plot lands for a green, public buildings and a market place, to be laid out by the judgment of said committee, who should afterwards report their doings ;—that the committee reported to an adjourned meeting, when the report was accepted and the plot established ;—that said committee, according to the vote, laid out a certain lot in the plot as a public lot of land, to be used for the purpose of having a court house and jail erected thereon, and for no other purpose whatsoever ;—that on the 24th day of September, 1833, the inhabitants of the town plot of Ferrisburgh, then and now being a public corporation, by and under the name and description of the “mayor, aldermen, common council and freemen of the city of Vergennes,” at a public meeting duly warned and assembled, assuming upon themselves the right to control said court house and jail lot, did by public vote resolve and order that the court house and jail lot in the city of Vergennes be and is hereby granted to the protestant episcopal society, for the purpose of erecting a church, &c. except that part on which the court house now stands, &c. exonerating said city from all liability in case said society should lose said lot ;—that said meeting was thin, only 21 voting, 16 for and 5 against the motion ;—that the defendant and others, as a committee of said protestant episcopal society, by virtue of said vote, and with no other authority, have broken up the soil and erected thereon a large brick building, and thereby committed great waste, &c. ;—and that the orator, in order to have the title of himself and other proprietors of said town of Ferrisburgh tried and established, has instituted an action of ejectment against said protestant episcopal society in Vergennes, which is still pending. The bill then prays, that the society, and all persons acting under them, may be enjoined from finishing or using said building until the final decision of the suit at law, and then if the plaintiff there succeeds, such other relief as shall be proper.

The answer of the defendants admits, that the premises described were laid out by a committee of the proprietors, as set forth in the bill, to put a court-house and jail upon, but deny that it was set apart for *that* purpose and no other. They also admit a vote of the inhabitants of the city, and then say they are a committee appointed by the protestant episcopal society to build them a church, and fully believing that the inhabitants of the city had a right to make the grant, they executed and finished a house of public worship, which has been consecrated, and the society intend to con-

time the use of it, and they submit that the right should be settled in the suit at law. They deny the orator's title, and say that they believe the proprietorship of the town of Ferrisburgh was dissolved in 1800.

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Upon this bill and answer, the question is, whether an injunction should be granted, not to prevent the building or completing the church, for that is already done, but to prevent its being used for public worship. It would be rather irreverent to call that staying waste, and there would seem to be no good reason to order the suspension of the worship, even if the plaintiff's title was indisputable, and the defendants had entered without color of right. It might be otherwise, if the defendants had turned the orator and others out of a building by them erected or owned. The trespass, if any, was upon the land by building the church; but the use of an additional sanctuary in the city, pending the controversy at law, cannot injure the orator, but may be salutary to the citizens. When the bill was brought, probably the building was not finished or consecrated, for the complaint states, that the defendants "had broken up the soil and erected a large brick building thereon." Although we are to consider the facts as they now exist, yet as they were, the application was very late. Why was not the application made, at latest, as soon as they broke ground? Why was it delayed until a great expense had accrued in a good cause, which, according to the orator's view, in that place was a great public nuisance which must be abated?

Besides, the title of the orator and his associates is not clear and certain. It is at least obsolete, and possibly extinguished, and the right of the defendants to the easements they claim has some plausibility, as the proprietors voted "lands in said town plot for a green, public buildings, and market place." Whether the doings of the committee, and the vote of the proprietors thereon, restricted this vote, and confined the use of the public lot for a court house and jail, may be a question. These and other points are fit subjects for the decision of a court of law, where the plaintiff will be entitled to his legal rights, however severely it may affect others; and his redress, if he prevails, will be quite adequate, as he may perhaps obtain the bettering house without being subject to the betterment act, and these defendants are not stated in the bill to be unable to respond in damages. At all events, the society for whom they act are quite responsible; for although the highly respectable protestant episcopal mother church in Vermont has by some invidious persons been considered but a step-mother to the children of

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the state, yet she has been very prosperous in her temporal affairs, and by her glebes and her good luck in the law, as successors of the propagation society, has obtained a very solid footing in this state, and possesses, it is believed, a very pretty rent roll.

Upon the whole, we think the plaintiff, if he has a right, has an adequate remedy at law; that the defendants have not acted against equity and good conscience; that the orator was too late in his application, and his title doubtful, and the defendants' claim not clearly invalid. These reasons are quite sufficient to induce us to refuse an injunction, independent of a disposition to walk softly upon consecrated ground.

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BANK OF UNITED STATES vs. JOSEPH TUCKER *et al.*

In declaring on a jail bond, it is sufficient to allege that the prisoner was confined in jail on *mesne* or final process, stating the process without alleging the previous proceedings.

More is surplusage, and does not vitiate, unless it shows an illegal imprisonment.

If there exist any such defect in the previous proceeding as renders the imprisonment illegal, it should be pleaded by the defendant.

The court will not *presume* an officer of general jurisdiction proceeded irregularly.

This was an action of debt on a jail bond, alleging in substance, in common form, that the plaintiff recovered a judgment against Joseph Tucker and another, of the city of Vergennes, by the consideration of Addison county court, and took out execution in common form, directed to the sheriff of Addison county, his deputy, or either constable of said Vergennes, and delivered the same to the sheriff of Addison county, who for want of property, &c. committed said debtors to the keeper of the jail in said city of Vergennes; whereupon the defendants executed the bond now in question, whereupon the debtors were admitted to the liberties of said prison, from which they had escaped, and the bond was assigned to the plaintiffs.

To this there was a general demurrer and joinder. Judgment having been rendered in the county court, that the declaration was sufficient, exception was filed and the cause passed to this court for revision.

P. C. Tucker for the defendants.—By the fourth section of the act of October 30, 1794, which is an act in addition to an act incorporating said city, (Stat. p. 21,) it is provided that there shall be kept and maintained, in good and sufficient repair, a jail in said city, for the commitment of all city prisoners, and also all other prisoners who may be sent to said jail from any of those counties in which there shall not be a good and sufficient jail. By the act of November 8, 1803, (Comp. Laws, 226,) it is provided, that whenever any writ, process, warrant or execution, issued under the authority of this state, shall be directed to any officer or indifferent person in the county of Addison, by which it shall become his duty to commit the person or persons therein named to the county jail in said county, and such officer or indifferent person shall find that the person or persons named in such process shall be confined in the jail in the city of Vergennes, or legally bailed within the liberties thereof, it shall be the duty of such officer or indifferent person to commit such person or persons, (so committed on bail,) to the jail in the city of Vergennes.

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From these authorities, it clearly appears—

1. That the city jail is for city prisoners only, except in the contingency named, and which did not occur in the present case.

2. That the person or persons against whom any precept is issued from any court or courts, other than those of said city, cannot be legally directed to any officer to commit to said city jail in the first instance, save only in those cases where there is no county jail, which is good and sufficient.

3. That it must appear satisfactorily to the officer executing any such precept, that the person to be by him committed to said city jail is already a prisoner therein, or bailed to the liberties thereof by virtue of a city process. The right to commit to said jail at all depends upon this fact as a condition precedent.

The defendants contend, that, according to the plaintiff's declaration, the commitment upon which the bond was given was void, and consequently that they were never legally in the custody of the jailer of Vergennes, and that the bond taken to said jailer and assigned to these plaintiffs is also void.

The declaration sets forth, that the execution upon which said Joseph Tucker and Philip C. Tucker were committed, was issued by Addison county court, upon a judgment rendered on the second Tuesday of December, 1832; was taken out on the second day of January, 1833, for \$259 87 damages, and \$18 23 costs, and 25 cents for said writ of execution, signed by Samuel Swift of

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said county and returnable in sixty days; that it was delivered to Marshal S. Doty, sheriff of said county, on the 3d day of January, 1831—was directed to the sheriff of the county of Addison, his deputy, or either constable of Vergennes, in said county, to serve and return. And it further sets forth, that on the said third day of January, 1833, the said sheriff, by virtue of said execution, arrested and took the bodies of the said Joseph and Philip C., and them did commit to the keeper of the jail in the city of Vergennes, within the said prison. There is no command in said writ of execution to commit to said jail, and if there had been, no law exists to warrant it. The right to commit them existed only in the contingency of the sheriff's finding the defendants in said execution prisoners within said jail or its limits, and the declaration does not state that such was the case. So far as the declaration shows, the commitment was totally void, and by consequence, the bond also.

The declaration, says Chitty, must allege all the circumstances necessary for the support of the action. The degree of certainty required is, that to a certain intent in general, *which should pervade the whole declaration*, and is particularly required in setting forth the parties, time, place and *other circumstances necessary to maintain the action*.—1 Chit. Plead. 254. If a legal commitment to the jail of Vergennes was a necessary condition precedent to the validity of the bond itself, as is alleged, then that commitment should appear upon the face of the declaration to have been a legal one. Conditions precedent must be stated in the declaration to have been performed, or a lawful excuse given for their non-performance.—1 Tidd's Practice, 445. 4 T. R. 961—6 do. 570.

Bell and Waller for plaintiffs.—The counsel for the plaintiffs contend, that the declaration in this case is sufficient, on the following grounds.

The acts constituting the city court and jail, and providing for commitments in certain cases, to that jail, on process issuing from the county court, are public acts and need not be pleaded.

The act, (Stat. p. 226,) as far as it relates to the question, is a mere direction to the sheriff in regard to his duty, in a certain state of facts; and, inasmuch as there might arise a case in which, on such an execution as the plaintiff's the defendants might *lawfully* have been committed at Vergennes, it is to be *presumed* by the court, in the absence of proof to the contrary, that the commitment was made at Vergennes, in consequence of the state of facts *provided for by the statute*.

Where, *prima facie*, the proceeding is not illegal, the defendants must avail themselves of any matter of defence, by pleading it, and not by demurrer.—1 Chit. Pl. 254-5.

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The bond is the foundation of the action. It is set forth with legal precision and certainty; and it is in the form *prescribed by the statute*. Being legal, on the face of it, if it can be avoided by the defendants, it must be by matter which the plaintiffs were not bound to anticipate in the declaration.—Chit. Pl. 254-5.

The opinion of the court was delivered by

COLLAMER, J.—The only cause of demurrer to this declaration, now insisted on, is, that in alleging the commitment of the debtors to the jail in the city of Vergennes, by the sheriff of Addison county, it is not alleged that said debtors were already prisoners within said jail; as by the statute, the sheriff was authorized to commit to said *city jail* only in such case.

This is an action *on the bond*, and all that precedes the setting up of the bond is matter of *inducement*. So much of that as shows a state of circumstances in which the sheriff of Vergennes might take an official bond is immaterial, and all the remainder, surplusage. How much then is necessary? By the statute relating to jails and jailers, section 10, (Comp. Laws, 219,) it is provided, "that any person imprisoned in jail on *mesne* process in any civil action, or upon execution, &c. shall be admitted to the liberties, &c. such prisoner first giving bond," &c. So much in the declaration as showed the person *in jail on execution issued from a competent court*, was necessary. The declaration shows the issuing of such an execution, and shows the debtors were committed to the city jail of Vergennes. This shows all the necessary prerequisites. It is not necessary to allege, that the sheriff was sworn, the debtor in his bailiwick, the demanding payment at his house, the want of property, nor, by parity, a previous commitment in Vergennes. They are not predicates mentioned in the statute to the giving of the bond. Should there exist any such previous defect as would render the imprisonment absolutely illegal and *void*, it must be pleaded and shown by the defendant. What would have such effect as *to make the bond void*, it is not now necessary to decide. It is however true, that if the plaintiff alleges more than is necessary, though that does not require him to make still further unnecessary allegations, yet if what he alleges makes an unlawful case, the court cannot reject a part as surplusage, and so save the case, but must give judgment against him. Is such this

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case? The plaintiff alleges a commitment in the city of Vergennes, on an execution issuing from Addison county court by the sheriff of the county. If this is necessarily *unlawful*, the plaintiff must fail. In one contingency this might be lawful, and as the sheriff acted, the court must by legal intendment suppose that contingency existed, and the sheriff conducted lawfully, until the contrary is shown.

Judgment affirmed.

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JAMES WILDS vs. JOSEPH BLANCHARD.

A log coal-pit, on fire, and partly burned, is incapable of attachment.

This was an action of trespass for two thousand bushels of charcoal, taken by the defendant. On the trial it appeared, that the plaintiff, as constable, on the 9th day of January, 1834, had for service two writs of attachment against Hyman Holcomb and one against O. Holcomb, by virtue of which the plaintiff attached a quantity of coal. It was in a log pit, about half burned, owned and in the possession of said Holcombs. The plaintiff left attested copies of said attachments in the town clerk's office, according to law. It appeared that the plaintiff directed said Holcombs to take charge of said burning coal-pit *through that night*, and he never took any further charge or care of it. It was conceded, that the whole would have been consumed and lost, but that the said Holcombs afterwards continued their care, completed the work, keeled out the coal and sold a part, and the defendant assisted in procuring part of said coal to be drawn away and sold; though he had notice of the plaintiff's claim. Said writs of attachment were duly returned, and proceeded to judgment.

The court decided, that inasmuch as said coal-pit was but half burned down, and as the plaintiff left the care of said coal to said Holcombs, and they remained in possession and did sell and dispose of the same, and did permit the defendant to carry away the same, this suit could not be sustained, and therefore charged the jury to return a verdict for the defendant. To which decision the plaintiff excepted, and the cause passed to this court for revision.

Needham and Bradley for plaintiff.—By a statute law of this state, passed November 2, 1826, (laws of 1826, p. 3,) it is en-

acted, that when charcoal is attached, the officer serving the process shall or may leave a copy of said process in the town clerk's office in the town where said coal is situated, and it shall hold the property as effectually as if the same had been taken into the possession of said officer, which said copy was so left in this case by Wilds, the officer, and plaintiff in this case.

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But it is contended by the defendant in this case, that the coal or pit was left in the care of the defendants in said suit, and they were there attending to the pit in the progress of burning, and that they consented to the said Blanchard's taking said coal; and therefore the plaintiff was guilty of a fraud in law, by which he lost his lien and the pit.

To this the plaintiff says in answer, that it could not have this effect in this case, as the defendant had knowledge of the existence of the plaintiff's attachments and lien on said coal, and it was necessary that some person of skill in coaling should constantly attend to said coal and pit, or it would shortly have been consumed and lost; and as every man is not a coaler, it might be difficult, as it was in this case, to procure a proper person to seasonably attend and prevent the ruin of the said property.

Linsley and Chipman for defendant.—The property attached by the officer was not subject to attachment, because it could not be re-delivered to the debtor in the same state it was in when attached. It was undergoing the process of conversion from wood to coal, and required that a large amount of labor should be expended before the process could be completed.

If the officer had left it, in the situation it was when attached, it would have been wholly destroyed; and he was not authorized to convert the article attached into a different thing by a manufacturing process.

The officer has only power to take the thing attached, to be kept in the same state it was in when taken, to await the termination of the suit. This is the extent of his authority. He cannot set up as a manufacturer of the property. He can neither tan hides, burn bricks, or make coal.

He can do nothing with the property, except to keep it, without the consent of the debtor; and if he obtained his consent, he would be acting under an authority derived from the debtor, and not by virtue of his process.

As the statute is silent on the subject under consideration, we must resort to the common law for our guide; and it is a funda-

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mental principle in relation to distraining, that nothing can be distrained except what may be returned in the same plight to the debtor.—*Leavitt vs. Holcomb*, 5 Vt. Rep. 405. *Bond vs. Wood*, 7 Mass. Rep. 128-9. Cro. Eliz. 783.

2. The officer's leaving the coal pit in the possession of the Holcombs was a waiver of any lien he might have acquired by the attachment.

It is true the statute protects the lien in certain cases, when a copy is left with the town clerk. But all such attachments apply to cases where no actual and visible possession of the property is necessary for its preservation.

But surely the officer cannot put the debtor in actual possession and have him use the property under him, and then bring trespass against any one, who, finding the original owner in possession of the property deals with him as the true owner.

If it be a fraud in law for a *bona fide* purchaser of property to leave it in the possession of the original owner, it must be equally so for an officer who attaches property to leave it in the hands of the debtor.—*Tainter vs. Williams*, 7 Cow. 271.

The opinion of the court was delivered by

COLLAMER, J.—Was the property in its then condition susceptible of attachment? This question is not disposed of by the statute which permits an officer attaching charcoal to leave a copy in the town clerk's office, which it is declared shall be effectual to secure the same against subsequent purchases or attachments. That statute only regulates or provides a *mode or method* of attachment; it creates no new subject matter, for it expressly provides the officer may remove the property. The question still returns, in what condition is property subject to attachment?

It is not law that every thing subject to decay is exempt from attachment, for all things decay. Nor are all those things which, left to themselves, would become useless, exempt; for cattle would starve. Nor are all things which are in progress of manufacture exempt, as in case of distress, for the benefit of trade; for if articles of value could be taken without injury and kept without skill, as shoes cut out, wool carded, or chairs unpainted, they may be attached. Neither are we confined in our attachment simply to the objects of common law distress. That was to compel appearance, ours is to respond judgment. It follows that the property must have value for such a purpose, and be capable of actual possession. But in this case it is obvious, the property was no more

coal than wood, was incapable of actual possession then as coal, and required labor and skill to make coal.

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It may safely be asserted, if property is so in the process of manufacture and transition as to be rendered useless or nearly so by having that process arrested, and requiring art, skill and care to finish, and when completed will be a different thing, then it is not subject to attachment. Such is a baker's dough, the materials in the crucibles in the process of fusion in a glass factory, the burning ware in a potter's oven, a burning brick kiln, or a burning pit of charcoal. The officer cannot be compelled to attach, as he should have the right of removal, nor is he bound to turn artist, or conduct by himself or agent such process, and be responsible to both parties for its successful result.

But if the officer actually enters upon such a service, and the owners of the property actually submit to it, others must not interfere. Was this case so? It appears that the plaintiff did no more than to tell the owners to take charge for that night, and he then abandoned it and did no more. The owners proceeded with their pit, as if nothing had been done, otherwise all would have been lost. The owners did not submit to the attachment, but continued their possession, care and control.

Judgment of county court affirmed.

STATE vs. ALLEN SMITH, *et al.*

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To impeach a witness, the inquiry must be as to his character for truth and veracity, and no inquiry can be had whether the witnesses are common prostitutes.

Upon the trial of this cause the respondent introduced several witnesses to impeach the character of Harriet Quackenbush and Rosetta Van Wait as to truth and veracity, whose testimony tended to prove that said witnesses were common prostitutes. This was objected to, and the court decided that the evidence was inadmissible; to which decision the respondents excepted, and the cause passed to this court for revision.

Mr. Linsley for respondent.—1. The testimony should have been admitted, because it was well calculated to aid the jury in placing a proper estimate on the credit of the two witnesses sought

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to be impeached. This may well be distinguished from the case where it is offered to be proved a witness has been guilty of some particular crime. The offer here is to prove such a general course of conduct as the party relying on the witness may be able to rebut if untrue, and which if true shows an entire disregard of moral principle.

2. Persons of this description cannot generally be successfully impeached by those possessed of character, for to them they are unknown. It becomes therefore indispensable to resort to this question in order to protect the rights of parties. In England, it is said, the true question is, would you believe the witness on oath? 1 Stark. Ev. 146. And it has been expressly decided in Massachusetts that you may prove a witness to be a common prostitute. *Commonwealth vs. Murphy*, 14 Mass. Rep. 387.

E. N. Briggs, state's attorney.—The credit of a witness may be impeached by contradicting him by other testimony, or by proof that he gave a different relation, inconsistent with his present testimony, or by general evidence to affect his credit.

The evidence to affect the credit must be as to the character or reputation of the witness in *point of truth*.—Stark. Ev. 147, and notes. Swift's Ev. 143.

The only case which can be cited as an authority for admitting the testimony is the case of the *Commonwealth vs. Murphy*, 14 Mass. Rep. 387, and that case has been virtually overruled by the case of the *Commonwealth vs. Moore*, 3 Pick. Rep. 194.

In New York the testimony offered is inadmissible.—*Jackson vs. Lewis*, 13 John. 504.

The moral character of a witness is not to be inquired into only as it affects his character for truth.

A witness's having the reputation of a common prostitute is no certain correct test of truth. There is no way to ascertain how far the reputation of a prostitute affects her character for truth, but by proving her general character for truth.—*Morse vs. Pineo*, 4 Vt. Rep. 281.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The question here presented has been directly decided, as appears by the case of *Morse vs. Pineo*, 4 Vt. Rep. 281. A similar decision was made in Windsor county. These authorities are decisive on this question. There is no reason why any inquiry should be permitted to impeach the character

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of a witness, except as to his truth and veracity. It is true the practice of most of the vices tend to impair the moral sense, and weaken the force of the obligation to speak or act with a due regard to truth. A continued habit of intemperance has this effect. Thieving, and undoubtedly the practice of the vice which was intended to have been the subject of inquiry in this case, have also the same effect. But if they have this effect, they of course destroy the character of the person for truth; and by limiting the inquiry as to the effect rather than as to the cause, which may or may not produce this effect, a sufficient security is provided against the effect of false testimony from witnesses whose character is such that they are not deserving of credit. If there are any reasons in those states where persons of this description congregate together so as to render it difficult to institute an inquiry as to the general character for truth, and justify a departure from the general principles of law on this subject, there are no such reasons here. The case under consideration shows that there is no necessity here for adopting the rule as established in Massachusetts, *Commonwealth vs. Murphy*, 14 Mass. 387. The two witnesses who it was offered to be proved were common prostitutes, were shown to be persons destitute of any character for truth and veracity. The rule adopted in Massachusetts has been expressly repudiated in the state of New York, *Jackson vs. Lewis*, 13 John. 504. The inquiry as to the character of a witness is limited in that state as it is in this, to the character for truth and veracity. We are not disposed to introduce a new rule of evidence on this subject. We apprehend the inquiry proposed would be entirely new in our courts of justice, dangerous, and in some cases slanderous, and no equivalent benefit would be derived from permitting such an inquiry.

There is no error in the judgment of the county court, and judgment must be rendered on the verdict.

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BANK OF MIDDLEBURY vs. PHILIP C. TUCKER et al.

Under number nine of the judiciary act, if a note is over \$100, but reduced by endorsements under that sum, the county court has jurisdiction.

This was an action in usual form on a note for \$125, commenced in the county court. After asking over of the note, the defendants plead to the jurisdiction, on the ground that the note was reduced at the commencement of the suit, by successive payments, to within \$100, and therefore within the jurisdiction of a justice of the peace. To this plea plaintiffs demurred and joinder. The demurrer was overruled, and the cause came here by appeal by the plaintiffs.

Starr and Bushnell for plaintiffs.—The declaration is on a note for \$125, in common form, on which are no endorsements. Plea of defendants, that payments have been made on said note before suit commenced, which reduce the sum due on said note to less than \$100, and therefore that the county court had not jurisdiction of the case; to which the plaintiffs demur.

The statute of 1823 (Rev. Stat. p. 140) enacts, "that from and after the passing of this act, a justice of the peace shall hear, try and determine all actions on book account, where the debit side of the plaintiff's book shall not exceed the sum of \$100; and all actions on note, where it shall appear by the plaintiff's declaration, or the endorsement or endorsements on said note, that the sum due thereon does not exceed the said sum of \$100." The statute gives the justice jurisdiction where the sum due on the note appears from the *plaintiff's declaration or the endorsements on the note*, to be less than \$100. Otherwise the jurisdiction belongs to the county court. The jurisdiction is not made to depend upon the *pleadings subsequent to the declaration, or the proof*, other than the endorsements on the note. Would a plea to the jurisdiction of the county court in an action on book by defendant, that although the debit side of the plaintiff's book exceeded the sum of \$100, there were credits on the plaintiff's book, or payments had been made by the defendant to apply on the plaintiff's account, which reduced the sum due the plaintiff to less than \$100, and a demurrer to the plea, would the county court be ousted of their jurisdiction?

The county court and a justice of the peace have not a concurrent jurisdiction. The plaintiff's declaration or the endorsements on the note, showing the sum due the plaintiff to be less than \$100,

affords a *certain rule* to determine the jurisdiction. It is not to depend on the subsequent pleadings, or other proof than the endorsements on the note. *If so*, the rule of jurisdiction would be an *uncertain one*. The purpose of the statute would be defeated.

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2. The words of the statute, *though affirmative*, as well in the first clause which relates to actions on book, as in the last clause relating to actions on notes, are in both to have also a *negative effect*, excluding the jurisdiction of the justice of peace when the debit side of the plaintiff's book exceeds \$100, and in the latter case when it does not appear by the plaintiff's declaration or the endorsements on the note, that the sum due the plaintiff is less than \$100.

3. A different construction renders the act of 1823 entirely nugatory, and leaves the jurisdiction of the justice of peace and county court as it was under the act of 1821. See Rev. Stat. p. 139.

P. C. Tucker for defendants.—The defendants contend that this case is clearly within the jurisdiction of a justice of the peace, and that all which is sought in the plaintiff's declaration might have been so presented, that the merits of the cause could and ought to have been tried by such magistrate. It is indeed true that the declaration of the plaintiff is, *prima facie*, for a sum within the jurisdiction of the county court, and beyond that of a justice of the peace. The defendants' plea, however, rests upon the fact, that by *payments* the note is reduced within the jurisdiction of a justice of the peace, and the plaintiffs by this demurrer admit the truth of that plea.

It was shown by the oyer given, that the payments thus admitted by the plaintiffs' demurrer to have been made were not endorsed upon the note. The admission, however, by the pleadings, that they were *made*, is to every intent as certain as if they had been recited in the plaintiffs' declaration, or endorsed upon the back of the note. The right of a plaintiff to receive money as payment upon a promissory note, and to neglect or refuse its endorsement is contrary to every principle of law and equity. It would be, in effect, to give the plaintiff the power of taxing the defendant with a county court bill of cost, when the law subjected him to that only which could arise before a justice of the peace, in every case existing under circumstances like the present.—Com. Stat. pp. 139–40. There is no concurrent jurisdiction in the county and justice courts. That which can originally be tried in one cannot as original case be heard before the other.—Com. Stat.

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119-91. The case is within the principle of *Southwick et al. vs. Merrill*, 3 Vt. Rep. 320, and *Bates vs. Downer*, 4 Vt. Rep. 178.

The opinion of the court was delivered by

MATROCKS, J.—This was an action on note for \$125, commenced before the county court, and a plea to the jurisdiction because “the note which is the foundation of this action has by payment been reduced within the sum of \$100,” and therefore was within the jurisdiction of a justice; to which the plaintiffs demur.

The justice act, No. 1, authorizes a justice to determine “on all specialties, notes of hand, and settled accounts, not exceeding the sum of \$53. Upon this act it was doubted, and there were different decisions upon the question, whether, if the face of the note was over that sum, and reduced below by endorsement, the county court or a justice had the jurisdiction; which occasioned the act No. 3, authorizing a justice to determine any action on note given for more than \$53, “if it shall appear from the plaintiff’s declaration, or from the endorsement or endorsements on such note, that the sum remaining due thereon does not exceed \$53.” Then comes act No. 9, which enlarged the jurisdiction of a justice to \$100, “when the debt or other demand does not exceed \$100.” Under this phraseology, which made no distinction between notes and other demands, the old dispute under No. 1 was revived. Although the wording of the acts was not alike, yet the controversy was the same, whether the face of the note, or the sum due after deducting the amount of the endorsements was the criterion of jurisdiction. Last came No. 10, which settled another point in controversy, by virtually compelling the lawyers to bring actions of book before the county court, for a balance however trifling, when the debit side (including by construction of the act the interest on that side,) happens to be over \$100. Then the act says as in No. 3, before quoted, except that \$100 is substituted for \$53. These acts, viewed in connection with the judicial history of this subject, which we have a right to take notice of, amount to a plain and repeated legislative declaration, that the jurisdiction of justices on a note is to be governed by what shall appear to be due by the whole note itself; that a note, whether with or without endorsements, is to be computed upon the question of jurisdiction, as the clerk would make up the sum on default; and so it has been understood and practised since the passing of the acts. But if the debtor has paid a part without taking the precaution to have it endorsed, he has only to tender the balance, and the plaintiff would

proceed at his peril. It is to be understood, that the question of jurisdiction on note and on book, which has called out the acts of the legislature as mentioned, is distinct and different from what is meant by "debt or matter in demand." That question has been discussed in several reported cases, and this judgment is not intended to infringe any of those decisions.

Judgment of county court reversed.

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NATHANIEL GIBSON vs. EBENEZER SCOTT et al.

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In an action on a jail bond, where the execution issued in pursuance of a rule of court, an inquiry cannot be made whether the execution issued regularly, or whether the rule was complied with.

This was an action on jail bond, taken on the commitment of Scott, the defendant, on an execution in favor of Gibson. When the judgment upon which the execution issued was rendered, it was agreed by the parties, and made a rule of court, and entered on the docket, that execution was not to be issued until Gibson should execute a deed agreeably to a certain award which had been made between the parties, and lodge the same with the clerk of the court. A deed was lodged by Gibson with the clerk, which he supposed to be a compliance with the rule, and upon request of Gibson execution was issued and defendants committed.

Upon trial the defendants offered the rule of the court and the award in evidence, and then offered the records of the town of Bristol and other testimony, tending to show that the award had not been complied with. But the court rejected the evidence as improper in this suit, to which the defendants took their exceptions.

H. Seymour for defendants.—The defendants contend, that an execution issued without complying with the rule is void and the proceeding under it. In the case of *Starr vs. Hall*, on jail bond, the defence was, that adjournment was entered—an execution running 120 days, which should have run but 60 days—defendant committed after 60 days had run—debtor discharged. 1 Pick. Rep.

J. Doolittle for plaintiff.—If the execution had been illegally issued, the proper remedy would be, *audita querela*, when a proper issue could be formed, and by which the execution could be set aside, but the question cannot be decided in this collateral way and directly contrary to the record.

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The opinion of the court was delivered by

WILLIAMS, Ch. J.—The question in this case is, whether the evidence offered and rejected at the county court tended to show that the execution, which issued from the county court, on which the defendant Scott was committed to jail, was void.

It is contended that the execution was wholly void, and if it is so, the plaintiff was a trespasser. But we think the evidence offered had no tendency to prove the execution void. It appears that judgment was rendered in the suit of *Gibson vs. Scott*, under a rule that execution was not to be issued until the plaintiff executed a deed, agreeable to an award, and lodged the same with the clerk. It appears that a deed was filed and lodged with the clerk, who, considering the rule complied with, issued the execution. If the clerk was imposed on, or if he misjudged as to the requirements of the award, application should have been made to the court to set aside the execution, or some process should have been instituted to vacate the execution. Until set aside, the execution must be considered as regularly issued. An inquiry either as to the title of the land conveyed by the deed, or the regularity of the award, or whether truly complied with, could not be made in any collateral action, nor could it arise either in an action against the sheriff for an escape of the debtor on the execution, or in an action instituted on the jail bond. If the inquiry was proper in this case, it would have been equally proper if the suit on the jail bond had been instituted before any other tribunal, and would have presented this absurdity, that a justice of the peace, or other court, would be called on to determine whether the county court, in issuing the execution in question, violated their own rules. It would seem to be more proper to leave them to decide upon this, and to declare whether the proceedings of their officer should be vacated or not. The case referred to of *Starr vs. Hall* was wholly different from this. The inquiry there was, whether there was any judgment rendered on which to found an execution. No record of the judgment was produced, but evidence was offered to show, that in point of fact no such record was made, or judgment rendered. This was wholly different from the question here presented, where the judgment was regular, and the rule on which the execution was to be issued appeared by the records of the court to have been complied with. The court who made the rule should be applied to for relief, if the same has been violated.

The judgment of the county court is affirmed.

NATHAN WOOD vs. IRA STEWART.

ADDISON.
January,
1836.

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When a deposition contains matter improper to be given in evidence, it should not be delivered to the jury, but the party should be permitted to read only such parts as are admissible.

Where in a written contract, a party was under obligation not to sell a factory, &c. without giving ninety days notice, and likewise allowing him a preference. It was held that such notice might be proved by circumstances, as the acts of the parties, &c.

The party for whose benefit such notice is to be given, may, by his conduct, waive the same.

This was an action on a contract in relation to carrying on and selling a cotton factory. On the hearing of this cause the plaintiff read in evidence a written contract between plaintiff and defendant, dated June 30, 1830, a clause of which reads as follows,—

“ And further it is agreed that the said Ira shall have the right to dispose of the interest of him and the said Nathan, in the property to which this agreement refers, whenever he shall judge it for the interest of the parties to this contract so to do. Provided however, that said Stewart shall not dispose of nor sell the same, without giving said Wood ninety days notice, and likewise allowing said Wood a preference should said Wood desire to purchase said factory, or said Stewart’s claims to the property aforesaid.”

The plaintiff also read a lease from James W. Stevens to Joseph Hough, dated July 25, 1826, of said factory.

It was admitted by plaintiff and defendant that the defendant sold the factory mentioned in the lease and contract, to Benjamin Marshall in May, 1831.

A deed of assignment from Stevens to Samuel S. Phelps, Ira Stewart and others, was also read, and an assignment or surrender from Hough to them.

The plaintiff gave evidence tending to prove the damages which he had sustained by the breach of the contract, and offered in evidence the deposition of Joseph Hough. This was objected to by the defendant, and the court excluded and struck out so much as was included in brackets.

The defendant introduced evidence tending to prove that the sale of the factory at the time it was sold, was necessary from the situation of the same, and the incumbrances thereon, that Mr. Marshall held a mortgage thereon amounting nominally to about \$42,000, and had commenced a suit in chancery to foreclose his mortgage, and an action of ejectment against both the plaintiff and defendant and other persons in possession to obtain possession as

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well as to recover the rents and profits, and that the assignees intended to abandon the same to Marshall, but sold to him as the only safe and practicable course both for themselves and for the interest of the creditors of Stevens.

The defendant then offered to prove by the deposition of James Burt and by Samuel S. Phelps, Esq. that the plaintiff knew of the negotiations going on for the sale and of the intention of the assignees to abandon as aforesaid. And that he advised the assignees to resist the recovery by Marshall as long as practicable, and not give up possession until compelled thereto, and that with those who had an interest in the concern, to wit, the defendant, plaintiff, the assignees and creditors of Stevens, the sale was a subject of daily conversation and consultation—that the plaintiff and defendant were in habits of intimacy, and were concerned together in the factory, and that the plaintiff knew of the sale after the contract was made and before it was completed by defendant and Marshall, and that he was opposed to the sale and requested them to resist the recovery by Marshall, as aforesaid. This was objected to by the plaintiff and admitted by the court, and the witness testified substantially to the above facts.

The plaintiff requested the court to charge the jury that by the contract the defendant was bound to give the plaintiff specific notice of the sale proposed to be made with the terms thereof, ninety days previous to the sale, and that the jury could not infer this from previous propositions for sale, or from the fact that the sale was a subject of consultation and conversation among the persons interested.

Upon this point the court charged the jury that the defendant was bound by the contract to give the plaintiff specific notice of the sale and terms thereof, ninety days before he made any sale; but the jury might believe that such notice was given, from the facts given in evidence as herein before stated. Although there was no direct or positive evidence that such specific notice was given, and if, from the circumstances which were in evidence before them, they believed that such notice was given to the plaintiff, of the sale and terms thereof, ninety days before the sale to Marshall, the plaintiff could not recover.

To the decision of the court both in rejecting the part of the deposition of Hough, and in admitting the testimony objected to, and to the charge to the jury thereon, the plaintiff excepted.

Exceptions allowed by the court and the cause passed to this court for revision.

The following is the part of Hough's deposition included in brackets.

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“And this deponent further saith, that when he was informed that the said Stewart had sold out to the Messrs. Marshall, he was greatly surprised, and therefore had several conversations on that subject with the said Ira Stewart. And this deponent further saith, that in one of his conversations with the said Stewart, he, the said Stewart, denied in the most positive and peremptory manner, that he had any interest whatever with the said Marshall. He stated to the deponent that it was an outright sale of the whole property without any reservation whatever, and that he, the said Stewart, had no interest whatever, except as agent for the said Marshall, for which agency he was allowed a liberal salary.”

Mr. Seymour and Mr. Linsley for defendant.

Mr. Starr and Judge Phelps for plaintiff.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The plaintiff declares on a written contract the breach assigned is, that the defendant sold the factory therein mentioned, without giving him ninety days notice as stipulated. The very foundation on which the plaintiff made his claim, was that the defendant had sold the factory. Accordingly, after the contract was read in evidence, the sale was admitted by the defendant. The plaintiff then offered the deposition of Hough, a part of which was excluded by the court. It is difficult when a deposition contains matter improper or irrelevant, at the trial, to separate that which is admissible from that which is not. Probably the better practice would have been for the court to exclude such depositions altogether. Such, however, has not been the practice. When a deposition contains matter which ought not to go to the jury, the deposition should not be delivered to them; but the party should be permitted only to read that part which is admitted. On examining the case we cannot see that it would have been material or pertinent to the controversy to have admitted that part of the deposition excluded. It is only claimed now for the purpose of rebutting testimony which had not then been given in evidence, and the court could not then have anticipated that any thing, to take place thereafter in the course of the trial, would make the part of the deposition excluded, either pertinent or proper testimony. The deposition it seems was not afterwards offered, and if it had have been, the inference which it is now attempted to draw from it is very faint. If the defendant denied the sale to Mr. Hough, he may have ad-

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mitted it to the plaintiff. The next objection to the proceedings of the county court arises from their admitting the evidence to prove notice of the sale. My view of that stipulation in the contract is, that it only required that notice of the intention to sell, should be given ninety days, thereby giving to the plaintiff an opportunity of competition with others in purchasing. The county court, however, it seems, considered that notice of the sale and of the terms of the sale should be given. But there is nothing in the nature of this notice which required that it should be proved by positive testimony. It might as well be proved by circumstantial or presumptive evidence, provided it was satisfactory. The fact that a sale was unavoidable, the acts of the plaintiff, the intimacy then subsisting between him and the defendant, his knowledge of the intention to sell, being in habits of daily conversation with the defendant and others concerned, his advice to resist the claim set up against the factory which rendered the sale necessary, were strong circumstances to convince the mind that he actually knew of the sale, as well as the terms thereof. Such evidence was admissible for this purpose. How much was proved by the circumstances thus given in evidence, was for the consideration of the jury. The plaintiff claimed that the court should instruct the jury that the defendant was bound to give the plaintiff specific notice of the sale proposed to be made and the terms thereof, ninety days previous to such sale, and it appears that the court took the same view of the contract. The request that the jury should be instructed, that they could not infer this from the circumstances in evidence, but that it must be proved by direct and positive proof, ought not to have been complied with by the court for the reasons already suggested. Under the charge of the court, the jury must have found that the plaintiff had notice of the sale and terms thereof ninety days before it was completed, and there is nothing in the deposition of Burt which should preclude them from finding the fact. The terms may have been agreed on ninety days before the sale, and that made known to the plaintiff, or the jury may have disbelieved the testimony of Burt if there was any thing in it which appeared at variance with that proposition. The jury were judges of the weight of the testimony, and we think they were warranted in coming to the conclusion which they arrived at. It may be further observed, that the notice required in the contract was intended for the benefit of the plaintiff. His conduct and declarations were clearly equivalent, to a waiver of any benefit intended to be secured to him by this notice. The object of it was to give him a preference in the purchase. He at

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no time manifested any intention to purchase nor claim the preference secured to him, but on the contrary he advised and insisted that the assignees of Stevens, of whom the defendant was one, should resist a recovery by Mr. Marshall, and retain the possession as long as practicable. This they were under no obligation to do; and it would have been very imprudent in them to have taken such a course. A due regard to the interest of themselves and the creditors of Mr. Marshall, required that they should dispose of the factory, and not incur the hazard of losing the whole by an unprofitable lawsuit with Mr. Marshall. If the jury were not authorized to infer that such notice was given, as they were required to find in pursuance of the charge of the court, it would be wholly useless to send the case to another trial where the jury must be told that from the same evidence they should infer that the plaintiff had waived all and every advantage to be derived from or secured to him, by the provision for notice contained in the contract. It is, however, contended that the court erred in charging the jury, that if the fact of notice was proved the plaintiff could not recover, that as the defendant could only sell when he judged it for the interest of the parties to sell it was a violation of his contract with the plaintiff if he sold when it was manifestly against their interest. This part of the charge, however, is only in answer to the request on the subject of notice. Neither the declaration of the plaintiff nor the request of his counsel supposed a fraudulent sale by the defendant. The charge of the court was only, that so far as the claim of the plaintiff depended on his not having any notice of the intended sale, if the jury believed he had such notice, there could be no recovery. But furthermore, the gravamen of the plaintiff's complaint and declaration was, that a sale had been made without giving the plaintiff the preference to which he was entitled, and not that a sale had been made when it was not for the interest of the parties. All considerations, therefore, in relation to the manner of the sale, whether it was proper or improper, should have been excluded from the jury, as the right of the plaintiff to a recovery depended wholly upon the fact that a sale had been made.

The judgment of the county court must be affirmed.

CASES IN THE SUPREME COURT

RUTLAND COUNTY.

FEBRUARY TERM, 1835.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice*.

| | | | |
|---|---|-------------------|------------------------------|
| " | " | STEPHEN ROYCE, | } <i>Assistant Justices.</i> |
| " | " | SAMUEL S. PHELPS, | |
| " | " | JOHN MATTOCKS,* | |

RUTLAND,
July,
1835.

LEONARD UTLEY vs. ROBERT H. SMITH.

The removing property out of a state, by a person to whom the same has been delivered for safe keeping, by an attaching officer, does not dissolve the attachment.

This was an action of trespass for taking certain articles of personal property. On the trial it appeared, that the property had been attached at the suit of the plaintiff, at Granville in the state of New York, as the property of one Hartwell, and by the attaching officer there delivered to the plaintiff, on the agreement that he should re-deliver the same on demand, or account for the same to said officer, and that the officer should not be accountable to the plaintiff, if said property should not be returned. The plaintiff carried said property into the adjoining town of Pawlet, in Vermont, and before the return day of said attachment in New York, the defendant took said property from the plaintiff, on attachment against said Hartwell, returnable in this state. The court directed a verdict for the defendant, on the ground that the lien, both of the constable and the plaintiff, occasioned by the attachment in New York, was discharged by carrying the property into the state of Vermont, and that it was thereby made liable to attachment as the property of Hartwell. To which decision there was exception, and thereupon the cause passed to this court for revision.

G. W. Harmon for the plaintiff.—The only question is, whether the lien, occasioned by the attachment in New York, was discharged by carrying the goods into Vermont.

*An adjourned term was held in July, at which Judge Collamer was present—Judge Mattocks absent.

An officer, having attached the goods of a debtor, by virtue of process, thereby has acquired a lien upon such goods, or a qualified property in them, for the purpose which the law defines; which lien, or qualified property, cannot be divested, except by consent, or in due course of law.

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But though such officer has *attached* the goods, in virtue of the writ, which is his only authority for so doing, he does not thereafter continue to *hold* them in virtue of such writ, which may be, and commonly is, immediately returned, and is placed on the files of the court; but he continues to *hold* the goods in virtue of his lien, or qualified property in them, which is superinduced by his official duty, and his relation to both parties in regard thereto. In this state this duty and relation require the officer to restore the goods to the debtor, in case the judgment be for him; or, by any means, the goods are relieved from the lien of the creditor; that of the officer still remaining, until he has returned the goods to the debtor. In the state of New York, the duty and relation of the officer are to and with the creditor only; to hold the goods for his benefit, and to respond the judgment he may recover, or to return them to such creditor, if the judgment be for the debtor; or by any means the claim of the creditor upon the goods, to satisfy his demand against the defendant, be dissolved; the creditor, or plaintiff, and not the officer, being in that state accountable for a return of the goods to the defendant in such case. Hence, the right of the officer to hold the goods attached being a *right of property*, though a qualified one, arising out of duties and relations to others, which continue to subsist after the return of the writ, such right being merely personal, must of course accompany his person, and must be the same in every place. A title to personal estate, acquired in one state, is good and is always respected in all other, even foreign countries. It is upon this principle only that a title to personal estate, acquired under a decree of a court of admiralty, in one country, is always respected as conclusive in all others, even in those which are at war with that in which the decree was made. It is the same with title by execution, and, of course, by attachment.—Story Comp. 412, 463. The case is analogous to that of bail, who, owing a duty, that is, being accountable to the creditor or officer for the appearance of the principal, may arrest him wherever he finds him, though his right, authority or title to do so was acquired in another jurisdiction. The question never can be, *Where* was the right over the person or goods exercised or claimed? but, *What* is the right or title, and is it a valid right or title? For, if such right or title were

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once valid, that is, legally acquired, it cannot be divested, except by consent or due course of law.

The goods, in the present case, having been bailed by the officer to the plaintiff for safe keeping, serves to illustrate the foregoing argument. Had the owner of the goods, under claim of right, or had another officer, in virtue of a precept in the state of New York, taken the goods from the plaintiff in a suit by him, in either case, the only question (the taking admitted) would have been one of property,—Has the plaintiff a qualified property in the goods for which he sues? But the plaintiff upon becoming the bailee of these goods for safe keeping, by agreement with the officer carried them to his own house in this state, where they were taken from him by the present defendant, upon process from a magistrate in this state. Here again the same question occurs,—Has the plaintiff a property in the goods to enable him to maintain his action? In answer to this question, it appears that the officer in New York, having acquired a legal title to them by an attachment lien, bailed them to the plaintiff for safe keeping; thereby placing the title of the plaintiff and his right of recovery beyond controversy. For, the question of title is the only one in the case.

In the case of *Brownell vs. Manchester*, 1 Pick. Rep. 232, a deputy sheriff attached goods in Massachusetts, carried them into Rhode Island, and delivered them to a bailee, taking his receipt. It was held that the officer might maintain trespass against strangers, who took them from the keeper in Rhode Island.—1 Chit. 168, note¹.

Ormsbee, for defendant.—The defendant contends in this case, that whenever property attached under a particular jurisdiction is carried out of and beyond that jurisdiction, the property becomes subject to attachment under the laws of that government within the limits of whose jurisdiction such property is carried.

The attachment of a debtor's property, when made under *mesne process* does not divest the debtor of the right of property. It merely takes from him the possession.

To decide that property attached under one jurisdiction and removed to another is not subject to attachment under the laws of that other, is to decide that property of any amount may be kept without being subject to attachment or execution. It would take the property from the power of the first jurisdiction without submitting it to the last.

The opinion of the court was delivered by

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COLLAMER, J.—This property was legally attached in New York, and a qualified property thereby created in the officer to the property, for which he was liable to the plaintiff to answer the debt, or to Hartwell if the attachment was otherwise discharged. It is obvious, this liability of the officer would continue both to the plaintiff and Hartwell, though the officer or his agent should convey the property into another state, and if his liability would continue, it is difficult to see why his qualified property, thus legally created, should not also continue and be recognized in a sister state. The legal possession being in the officer, he may deliver it to another for safe keeping, who thereby has the legal possession, the invasion of which is a trespass. The condition in the plaintiff's receipt, that he would return the property to the officer on demand, and that *the officer should not be liable to the plaintiff in the case the property should not be returned*, does not alter the case, as such would have been the effect had the receipt been silent on the subject.

The remaining question is, inasmuch as the property was delivered to the attaching creditor and was taken by the creditors of the owner, is not the officer discharged from both, and so his qualified property ended, on the ground that the *creditor* can never claim of him, as he took the property and never returned it, and the debtor can have no claim, as his creditors took and legally held it. This question may first be considered as unconnected with any change of the property from one to another jurisdiction. It has ever been the practice in this state, that the officer makes the attaching creditor keeper of the property if he is a responsible man and willing to undertake the trust. If the above doctrine be true, the debtor might in such case take the property from the creditor with entire impunity. This proves too much and is inconsistent.

In the second place, this attaching officer's liabilities were not ended. If, after settling the plaintiff's debt, Hartwell should call for his property, it would not be a defence for the officer or the plaintiff to say they had removed the property to another state, where it was subject to different process and exposed in a different market, and there it was taken by other creditors. The responsibility and qualified property in the officer did continue, and therefore this action may be sustained.

Judgment reversed.

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HENRY W. LESTER vs. TOWN OF PITTSFORD.

The opinion of witnesses is not proper evidence, except in cases depending upon skill in some science or art, or when the opinion of the witness is derived from personal observation of the transaction.

The opinion of a witness, not a professional man, formed upon a representation of the facts, as given in evidence, is never admissible.

In an action against a town for damage sustained by the insufficiency of a road or bridge, it is not enough for the plaintiff to show the road out of repair, and that an injury has been sustained, but he must show, *prima facie* at least, that the injury was occasioned by the defect.

This was an action on the case for the insufficiency of one of the public roads in the town of Pittsford, to recover damage for the loss of a horse belonging to the plaintiff, through the alleged insufficiency or want of repair of said road. On the trial of the case, the plaintiff offered evidence, tending to prove, that the road in question was a dugway, winding round the brow of a hill, and was but fifteen feet wide at the place where the plaintiff's horses run off said road.—That the side where the horses went off was the lowest part of the face of the road, and that there was no railing, or monument of any description, on the side of said road.—That at the place where the plaintiff's horses run off, there was an offset of six feet two inches in going five feet on a parallel line from said road; and that in ascending said road, it rises upon a degree of elevation of fourteen degrees and a few minutes.

The plaintiff having given evidence tending to prove the facts above stated, further offered to prove, by witnesses upon the stand, that in their opinion, said road was unsafe;—which last aforesaid evidence was objected to by the defendant, and rejected by the court. The plaintiff also proved on said trial, by two witnesses, that during the year said road was continued open (the same having been continued open by the defendants but one year) that they run off said road on the hill in question.

The defendant then offered evidence tending to prove, that the face of the road was smooth, and that large loads had been drawn up and down said hill with safety, and that said road was from fifteen to eighteen feet wide. The defendant also introduced evidence which proved that the horse in question was unshod; but introduced no evidence tending to show that the injury arose in consequence of said horse having slipped in ascending said hill; but it did appear, that there was a light snow, of from four to six inches, which fell the night before; and it also appeared there was no marks in the snow of said horse having slipped. The defend-

ant farther gave evidence tending to show, that the damage was occasioned by the plaintiff's horse refusing to proceed up the hill, and by his wilfully running backwards down the hill, and throwing himself off the road.

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The counsel for the plaintiff requested the court to charge the jury, that if they should find the road in question out of repair, or insufficient or unsafe, without some monument or railing on said road, it would be their duty to find for the plaintiff, unless the defendant should prove that the accident in question arose from some carelessness, default or mismanagement of the plaintiff: but the court charged the jury, upon the question as the burthen of proof, that although they should find said road out of repair and insecure, yet that the plaintiff must show *prima facie* in the outset, that he had been damnified thereby.—That merely proving that the road was out of repair, would not, of itself, entitle the plaintiff to recover; but in order to put the defendants on their defence, and change the burthen of proof, it was necessary that he should establish, at least *prima facie*, that the damage of which he complains was occasioned by the defect or insufficiency of the road, and that if the proof in the case was so uncertain as that they could not determine the fact, they would consider that the plaintiff had failed in one essential part of his case.

To the charge on this point, the plaintiff excepted. Exceptions allowed and certified.

Counsel for plaintiff insisted, 1st, That the court erred in rejecting the opinions of witnesses offered as to the insecurity of the road.

The dictum, so often found in books, that the opinions of witnesses ought not to go to the jury, has led to much confusion in practice, and is wholly inconsistent with the course pursued by courts in the cases reported. The opinions of men in any art or science, have always been received, although their opinions are founded on the descriptions of others. For cases involving questions of insanity,—judging of hand-writing, and judging of the capacity of persons to transact business, have been set down as exceptions to the general rule, but they are not so in all such cases. It is not opinion alone, but it is observation and opinion blended, as in the case of *Trelawney vs. Colman*, 3 Com. Law, 308, where the witness was permitted to testify to his opinion of the affection of the wife for her husband.

It is difficult to conceive any case, where observation affords ev-

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idence to the senses of a certain fact, where opinions should not be received, unless the transaction or thing described admits of a certain or graphic description; and it is believed it will be found, on examination, that the cases which are put down as exceptions to the rule, are much more numerous than those embraced within it.

When a person hears a contract, he testifies to what the parties said and did, and is not permitted to give his opinion of what was meant by the parties; for the law pronounces its opinion when the words used in making the contract are disclosed by the witness.

2. There are a variety of cases, and the present is one in which no description of the witness on the stand could convey to the mind any definite or correct description of the thing sought to be described. The witness might say the road was sideling up a steep and winding hill, with an offset on one side, and no railing; but all this does not inform the jury of the degree of danger or the necessity of banisters in passing over the road.

And it is contended that whenever observation and opinion are necessarily blended, opinions are to be received. To illustrate this position, we will suppose A sues B for drowning his horses in crossing the lake on the ice—B defends on the ground of using due care, and proves that others crossed, and that he kept in the road. Now the opinion of the witnesses is all the evidence the nature of the case admits of. No definite idea of the situation or looks of the ice can be conveyed to the mind: it is the judgment or opinion of men that determines whether B was exercising due care and diligence—not whether *other* men would *think* it safe to cross.

3. The opinions of witnesses as to the security or insecurity of a road, should be received upon the ground that all men may be said to be so far *skilled* in the subject of making common roads, that one rule of evidence is furnished to the same of the security or insecurity; and this doctrine is established, if skill is required in judging, by the case of *Davis vs. Mason*, 4 Pick. Rep.—also 3 Stark. Ev. 17, 36.

Counsel for defendant insisted, 1st, The offer to show by the opinion of witnesses that the road was unsafe, was against the clearest principles of evidence. Witnesses state facts, and the jury are to draw inferences. Any departure from this is an exception to the general rule. Persons possessed of any particular art or science may be asked their opinion in relation to facts connected therewith, upon the ground that the jury, if possessed of the facts, would be unable from a want of knowledge of that particular art or science, to draw just conclusions therefrom.

The case shows that the plaintiff had already proved the situation of the road.—3 Stark. Ev. 1736.

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2. Whether the road was unsafe or out of repair, was a mixed question of law and fact; and the witnesses were called on not only to draw inferences from facts, but to determine questions of law. The kind of repair that a road must be in, depends greatly on the amount of travel on the road, the season of the year, and perhaps the face of the country over which it passes. The jury are to draw conclusions in relation to all these particulars under the instruction of the court.

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The charge of the court was clearly correct in relation to the burthen of proof. If the road was out of repair, and the plaintiff was not thereby damnified, he cannot recover. It is essential to allege and prove that the injury arose from the insufficiency of the highway.

If the way was out of repair, yet if the injury did not happen at a place so out of repair, and in consequence thereof, no action can be maintained.

The language of the statute is conclusive, if any doubt could exist on this point.

This point in evidence is considered and settled in *Noyes vs. Morristown*, 1 Vt. Rep. 353.

The opinion of the court was delivered by

PHELPS, J.—The testimony offered in this case, of the opinion of the witnesses as to the sufficiency of the road, was properly rejected. The opinion of professional men, upon matters depending upon any particular science, or skill in any particular art, is always admissible. Such is the testimony of physicians and surgeons, as to the causes of death, insanity, or the like, and that of artists, mechanists, &c. as to matters connected with their particular art.

So also, testimony of opinion may be given, where, from the general and indefinite nature of the enquiry, it is not susceptible of direct proof. Thus upon a question of insanity, witnesses not professional men may be permitted to give their opinion, in connexion with the facts observed by them. But this evidence is always confined to those who have observed the facts, and is never permitted where the opinion of the witness is derived from the representation of others. Upon a question of insanity, for instance, witnesses, who have observed the conduct of the patient, and been acquainted with his conversation, may testify to his acts and sayings, and

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give the result of the observation: but where mere opinion is required upon a given state of facts, that opinion is to be derived from professional men.

But in cases where the facts are susceptible of distinct proof, and can be laid before a jury so as to enable them to draw their own conclusions, and where that conclusion does not depend upon skill in any particular art or science, the naked opinion of witnesses is not proper evidence.

In such cases, the jury are to form their own opinion upon the facts proved. They are the persons selected by law for this purpose, and are supposed to be competent. There is no good reason for transferring this duty to others, and there would be great danger, as well as inconvenience in it, especially in cases which have become a subject of excitement.

The inquiry in this case was a mixed question of law and fact. The facts were before the jury; and the testimony offered consisted of mere opinion upon the state of facts already in proof. The testimony offered was therefore inadmissible, and was properly rejected, as both inconvenient and unsafe.

As to the charge, there can be no doubt, that in the particular complained of, it was correct. The statute, the declaration, and the common rules of evidence, throw the burthen of proof upon the plaintiff. It was incumbent upon the plaintiff to make out a *prima facie* case, before the defendants could be put upon their defence. Proving merely that the road was out of repair would not entitle the plaintiff to recover; but it was necessary further to show that he was injured thereby. It was not incumbent upon the plaintiff to negative the charge of negligence or imprudence on his part,—such proof being properly matter of defence; but this proof was not necessary until a *prima facie* case was made out. And it is also true, that if the proof be deficient, the consequences fall where the *onus probandi* rests. The charge was therefore correct, and
Judgment must be affirmed.

JOHN A. CONANT vs GEORGE PATTERSON *et al.*

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February,
1835.

Where a debtor is admitted to the liberties of the jail-yard, if the creditor makes a contract with him, without the knowledge of the surety, which induces or causes him to depart or escape the liberties, he cannot recover on the bond.

After such escape, the creditor and debtor cannot create a new liability against the surety.

This cause came up for decision upon the following case stated :

This is an action on jail bond, taken by the plaintiff, as sheriff, on an execution in favor of Moses M. Strong against George Patterson. On the 29th January, 1834, the said Strong gave the said Patterson a contract, of which the following is a copy :

"I hereby agree, that the jail bond given on an execution in my favor, against George Patterson, shall not be sued until the first of May next.

" (Signed) MOSES M. STRONG.
" Rutland, 29th January, 1834."

The plaintiff relies upon a departure from the limits the 10th of March, which is admitted by the defendants, and it is also admitted that on the 15th day of February, 1834, Patterson departed the limits.

On the 10th day of March, 1834, the said Patterson executed to the said Strong a contract, of which the following is a copy :

"Whereas, Moses M. Strong executed to me his writing, dated 29th January, 1834, in which he agreed that a jail bond which had previously been given on an execution in favor of said Strong against me, should not be sued until the first of May next—Now, for value received, I hereby discharge said agreement from said Strong to me, and that the same shall no longer be binding and obligatory upon said Strong. Rutland, 10th March, 1834.

" (Signed) GEORGE PATTERSON."

The suit was brought before the justice on the 12th of May, 1834. Judgment for plaintiff, and appealed to the county court by defendants.

Royce & Strong for plaintiff.—The main question arising in this case is, whether the agreement described in the case amounts to a licence to depart the limits.

The words of the agreement do not import a licence to depart, and no such licence ought to be presumed.

But the fair inference from the agreement is, that there had been a previous breach, and the agreement is nothing more than an agreement not to sue until after the first of May, and it appears that the suit was not commenced until the 12th of May.

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Mr. Thrall for defendants.—1st. The defendants contend, that any interference of the creditor to induce the debtor to depart the limits, is a fraud upon the bail; and if there is a departure under an agreement not to sue for a particular time, the bail is discharged.—1 Whee. Sel. 509, 510.

2. After the bond has been once discharged either by a licence to depart or under a contract not to sue for a particular time, it is not in the power of the debtor, by any contract with the creditor, to revive the liability of the bail without their consent.

The case shows that the agreement not to sue was given on the 29th January, 1834, and that Patterson, the debtor, departed the limits under that agreement, on the 15th of February, 1834, and executed a discharge of the agreement to Strong, on the 10th of May, 1834, though the departure relied upon by the plaintiff was subsequent to the discharge of the agreement.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The decision in this case depends on the construction and effect to be given to a writing executed by the creditor in the execution, to the debtor. It appears from the case, that the writing was dated January 29th, 1834, and that Patterson departed from the limits on the 15th February, 1834.

It is an acknowledged principle of law, that if the creditor consent to an escape of the debtor while in prison, and the debtor, in consequence of such consent, goes at large, it is a discharge of the debt. Where a debtor is admitted to the liberties, and has procured bail, and where the consequences of his escaping fixes his sureties with the debt, every contract or dealing between creditor and debtor is narrowly watched. The debtor has a strong desire to be at liberty, and may, under hopes or encouragements held out by the creditor, do an act which he otherwise would not; the consequence of which is, to fix his bail. C. J. Swift says, "If a creditor should entice his debtor to go out of the limits, with a view to subject the sheriff, it would be no escape in the sheriff, and no action could be maintained on the bond." The language of our courts, in some of the earliest reported cases is, that if the creditor held out any inducement to the debtor to escape; it should discharge the jail bond. It cannot with propriety be said, that this language is too strong, or that it is not warranted by principles adopted in analogous cases. It is not however necessary, in this case, to go so far. If a contract is made by a creditor with his debtor, holding out to him expectations of benefit, which would induce or cause him to depart

the liberties, without which he would have remained within the limits, and this without the knowledge or consent of the surety, it is such a transaction between creditor and debtor as ought to discharge his bail.

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It is contended in this case, that from the language in this agreement, it is to be understood that the debtor, Patterson, had already escaped. It is not however to be so construed; and further, if it was, it would afford the surety another and equally valid defence, derived from this principle, that any agreement, between debtor and creditor, by which the creditor agrees to forbear prosecuting for a definite time, and by which, in the language of law, he ties up his hands, will discharge the surety.

Indeed, I do not see but that this principle of law is effectual to discharge the surety in this bond, whether made before or after the escape of Patterson, the principal. The agreement was, not to sue until the first of May. The creditor, by thus giving time to his debtor, and binding himself not to sue him for that period, thereby discharged all claim on the surety. The writing executed by Patterson to Strong, 10th March, after the escape, cannot alter the effect of the agreement entered into before. If the bail was discharged by the previous contract, or if the debtor had been induced to escape in consequence of that agreement, whereby his bail was discharged, he could not create a new liability on his surety, by a contract between him and his creditor. It required the consent of all the parties interested or affected by the writing executed in January to discharge its effect; and these parties were not only the debtors and creditors, but also the surety of the debtor: the latter has not consented to be again made liable.

In every view, this case is with the defendants.

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TREASURER of MIDDLETOWN vs. AMES and RUDD.

In an action of debt on a recognizance, taken for the appearance of a person arrested on a criminal process, it is no defence that the jury who tried the case were taken from the town to which the fine, on conviction, would be payable.

A party may not in a plea contradict the record of a court or magistrate, or impute to them fraud.

This was an action of debt upon a recognizance, entered into by the defendants for the appearance of said Ames, against whom a complaint and warrant had been issued in favor of the state, upon which he had been arrested and brought before a justice of the peace. Upon application of said Ames for a continuance, which was granted, the justice ordered the recognizance upon which this action was brought, and was conditioned for the appearance of said Ames at the time and place to which the cause was continued for trial, and from time to time, &c. to answer to the matters contained in the complaint. Upon the trial, the said Ames demanded a jury, which was ordered, who found a verdict of guilty; whereupon Ames was called and did not appear. *

The defendants plead in bar, first, that the jury was composed of freeholders of the town of Middletown, liable to pay taxes in said town.

Secondly, that on the day of trial, after the verdict had been returned, and after it had been ascertained how much the fine would be which the justice was about to inflict, and also what the costs of said prosecution were, the said Amos was by said court ordered into the custody of the constable of Middletown, and was by said constable received into his custody, and while in the custody of said constable he was permitted by said justice and by the grand juror who made said complaint, and also by the constable who so had the said Ames in his custody, to go whither he would for the purpose of endeavoring to procure some person to sign with him as surety a note to the treasurer of the town of Middletown for the said Ames aforesaid; and it was then and there agreed upon between the said justice and the grand juror who had the charge of the prosecution for the plaintiff, that if he would obtain a note as aforesaid, said sentence should not be pronounced against him, and that said fine should not be inflicted, and also that said Ames should have an opportunity to go at large to procure some person to sign said note as surety; and that while the said Ames was so at large by permission as aforesaid, endeavoring to procure some person to sign said note as surety, the said Ames was three times

solemnly called and did not appear, and that was the occasion as alleged in the plaintiff's declaration on which the said Ames did not appear and none other, and that he was and always has been at all times ready to make his personal appearance before said justice whenever thereto required, and to answer unto the matters and things that might then and there be objected against him in that behalf.

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These pleas in bar were decided by the county court insufficient, to which decisions the defendants excepted. Exceptions allowed and certified.

Royce and Strong for defendants.—1. The defendants insist that a verdict of guilty could not be found by jurors directly interested in the event of the suit. Upon common principles the interest of a juror is a ground of challenge, and if a party in a case prays for a jury, it is the duty of the court to see that a jury is ordered who can legally and impartially try the issue. Twelve jurors were challenged, and the respondent could do no more to secure his right of trial by jury.

2. A record may be impeached in some particulars as to time and place; and in all respects if the substance is retained.—3 Stark. Ev. 1046.

3. It is contended that the second plea in bar does not substantially contradict or impeach the record.

It is true that the record alleges that Ames was called and made default. This is not denied in terms by the plea, but it is insisted that so far at least as the bail is concerned we might show that he was discharged by the surrender of the principal.

3. The defendant insists further, that the second plea in bar discloses such facts as renders the proceeding void as to the bail being a fraud on him. The plea sets forth, that after the verdict of guilty the court in presence of the respondent assessed the fine and taxed the costs, and ordered the respondent into the custody of an officer; that the grand juror being the prosecuting officer, the justice and the officer all consented to the departure of the respondent, and that he was called during his absence with their united consent. This, it is contended, could not properly appear as a part of the record, but still is a fraud on the bail, and as such may be plead in bar of a recovery; and this more especially, as the plea, if sustained, proves conclusively that it was a mere attempt to charge the bail; for the plea alleges the return of the principal to receive the sentence of the court.—Stark. Ev. 252–3. 3 Coke, 77. 1

RUTLAND, Pick. Rep. 362-5. Day, 160, *Formon's* case. Stark. Crim. February, 1835. Pl. 410.

Tr. Middletown

Ames & Rudd. *J. and O. Clark for plaintiff.*—This was an action of debt on a recognizance, to which the defendants plead two pleas in bar. The plaintiff's action was founded on a record referred to in the plaintiff's declaration, and neither of said pleas contain or allege matter of defence subsequent to the judgment.

The county court decided that the plaintiff ought not to be barred, and that said pleas be not sustained.

It is contended that the county court decided correctly, for said pleas only contained matter tending to impeach or affect the record by a supposed illegality therein, and also averred against the record. And it is contended,

1. That the validity of a record cannot be affected or impeached in pleading by any defect or illegality in the transaction on which it is founded.—1 Chit. Pl. 354, and cases there cited.

2. In this case it is contended, that the only plea which could have been legally sustained by the county court for matters anterior to the judgment was *nul tiel* record; for it is a maxim in law, that there can be no averments in pleading against the validity of the record, though there may be against its operation. No matter of defence can be pleaded, which existed anterior to the recovery of the judgment.—1 Chit. Pl. 481. 8 John. Rep. 83, *Bullir vs. Giddins*. *McFarlen vs. Irwin*, 8 John. Rep. 77.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The question presented in the first plea in bar was virtually decided in the case of *State vs. Batchelder*, 6 Vt. Rep. 479. It was held there that a justice of the peace had jurisdiction of a complaint in behalf of the state, where the fine on conviction was payable to the treasurer of the town in which the justice resided. The same reason would apply to the case of a juror. The practice in this state has always been, when a jury was required in a criminal case pending before a justice of the peace to select them from the town where the trial is had. The statute requires that they should be taken from the freeholders of the vicinity, and this has been considered as intending, of the town. Very great inconvenience, delay and expense would result from any law which required that in trials for petty offences the jury should be selected from the neighboring towns. In all prosecutions where a fine may be imposed, if payable to the county or state

treasury, there may be a very trifling interest in every inhabitant of the county or state, and if an objection on that account should be sustained, the punishment by fine must be abolished. We think, however, that this is not required. The interest which a juror might be supposed to have in such a case is contingent, as the justice may bind over, even after a verdict, and the interest and feeling which all men fit to be selected as jurors will naturally have to promote public justice and protect the innocent, would overbalance any pecuniary interest which they might have in a small fine, such as a justice of the peace can impose. But furthermore, if the defendant was correct in his views in relation to the propriety of summoning the jury from another town, it is very clear, that here is not the place to present that question. It would in that case only be an irregularity in the proceedings of the magistrate, which should have been objected to at that time, or some measures should have been taken to vacate his proceedings. It is clear that it cannot make them void, or justify the respondent in refusing to appear agreeably to the condition of his recognizance, when thereto required.

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The second plea in bar is liable to two objections. In the first place it contradicts the record as set out. If the respondent was remanded into custody, in discharge of the bail, it should so have appeared by the records of the court. As this does not so appear, any averment of a fact, which should, if it existed, appear by the record, and which does not so appear, is contradicting the record. Moreover, it is directly contrary to the record. The conduct of the grand juror or the constable is wholly irrelevant. Whatever conversation they may have had with the respondent, or what they may have said or done, is of no importance whatever. And a plea of imputing fraud to the court is wholly inadmissible. Though a judgment may be impeached for fraud in the party, though it may be shown that a court were imposed on by the fraud of the party, yet it would be grossly improper to impute fraud directly to the court. This plea is entirely objectionable on this ground. Fraud is directly charged on the magistrate, who is represented as conniving with the constable and grand juror to subject the bail of the respondent rather than pronounce the judgment of the law on his conviction.

Neither plea can be sustained, and the judgment of the county court is affirmed.

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CALEB HUNT vs. WILLIAM FAY, Adm'r of RICHARD GOOKIN.

Where a person, having his domicil in New-Hampshire, dies there, and his estate is there represented insolvent, and commissioners appointed, the debt of a creditor residing there, who neglects to present his claim to the commissioners, is barred. Nor can such creditor move into this state, and have his claim allowed by commissioners appointed here, where an ancillary administration is taken out, and a commission of insolvency issues. The object of the administration here is only to prove the debts in this state.

This cause comes here for adjudication upon an appeal taken from the decision of the commissioners on the estate of Richard Gookin, disallowing the plaintiff's claim. A statement of the case will be found incorporated into the opinion of the court. In addition to what is stated in the opinion of the court, perhaps it should be noted that the plaintiff avers in his replication to the plea in bar, that the estate of Mr. Gookin, although represented insolvent by the administrator here, was in fact solvent; and at the time the plaintiff exhibited his claims to commissioners, he was domiciled here. The defendant also plead in bar a contract between him and Mrs. Gookin, administratrix, as merging the original demand, which was however not considered by the court, having decided the cause for the defendant on other grounds.

Mr. Upham for plaintiff.—1. Is the plaintiff's demand barred here because he did not exhibit it to the commissioner on Richard Gookin's estate in New-Hampshire?

This question, we think, can be answered in the negative, without doing violence to the law, or injustice to the parties.

The facts in the case, as admitted by the pleadings, are the following, viz: Richard Gookin, at the time of his decease, in 1826, had his domicil in Haverhill, in the state of New-Hampshire. The plaintiff also had his domicil in New-Hampshire, at the time of the decease of the said Richard, and until the 15th of October, A. D. 1830, when he removed from said New-Hampshire to Montpelier, in this state, where he has ever since resided and had his domicil.

The estate of Richard Gookin in New-Hampshire was represented insolvent, and a commissioner was appointed in due form of law to receive, examine, and adjust the claims and demands against said estate. The plaintiff did not exhibit his demand to the commissioner in New-Hampshire.

The estate of the said Richard, though represented insolvent, was solvent to a large amount, to wit, \$50,000.

It is also admitted that Gookin, at the time of his decease, owned a large estate in Rutland, Vermont, and that Mr. Fay of said

Rutland, was in due form of law, appointed administrator on said estate, and that he represented the same insolvent, although in point of fact, it was solvent to a large amount.

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Whereupon, commissioners were duly appointed to receive, examine, and adjust the claims and demands against said estate. The plaintiff having his domicil in Montpelier, Vermont, exhibited his demand against the estate of the said Gookin to the aforesaid commissioners, and it was rejected and disallowed. Whereupon he took his appeal in due form of law. And the question now presented to this court is, was the plaintiff's demand properly rejected and disallowed by the commissioners on said estate?

The administration granted to the defendant, Fay, is to be considered not only as a means of collecting the effects of the intestate within this jurisdiction, but of answering according to the rules of the same jurisdiction, the demands of creditors and all legal liens upon those effects.—*Selectmen of Boston vs. Boylston*, 4 Mass. R. 318, 324. *Richards, Adm'r vs. Dutch et al.* 8 Mass. R. 506, 515. *Dawes vs. Boylston*, 9 Mass. R. 337, 355. *Dawes vs. Head et al.* 3 Pick. R. 128, 145.

The plaintiff, at the time he exhibited his demand to the commissioners on Gookin's estate, was a citizen of Vermont, and entitled to the aid of our laws for the protection of his property and the recovery of his debts.

The 7th section of the New-Hampshire act regulating the settlement and distribution of insolvent estates, declares that all demands against such estate, exhibited to the commissioners and rejected by them, and not prosecuted to judgment in the manner in this act prescribed, and all demands against such estate, which by virtue of this act might have been exhibited to, and allowed by them, but which were not exhibited and allowed, shall be *forever barred*.

Now it is insisted here, that the plaintiff's demand is "forever barred," because he did not exhibit it to the commissioner in New Hampshire, where he had his domicil—where the commission of insolvency issued.

To this objection we answer, first, that Richard Gookin, at the time of his decease, owned a large estate in Vermont, as well as New-Hampshire; and that administration was taken in both states, and commissioners appointed to receive, examine, and adjust the claims of creditors to said estate. Now we maintain that the plaintiff was not bound to exhibit his demand to the commissioners in New-Hampshire, in order to save the statute bar. If he has exhibited his demand to the commissioners on *Richard Gookin's es-*

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tate, he has done all that the law required him to do for the protection of his claim.

The statute does not declare that all demands "shall be forever barred," which were not exhibited to the commissioners in the state where the intestate had his domicil at the time of his death. It says all claims which might have been exhibited to, and allowed by the commissioners, but which were not exhibited and allowed, "shall be forever barred." Were not the commissioners, appointed by the probate court in the district of Rutland, as much the commissioners on Richard Gookin's estate, as the commissioners appointed by the probate court in New-Hampshire? We think they were. If we are correct then in this view of the case, the plaintiff has lost nothing by omitting to exhibit his demand to the commissioner in New-Hampshire.

In the *second* place, we insist that the statute of New-Hampshire operates merely upon the remedy, and can have no extra territorial force. The *lex loci contractus*, we admit governs as to the *nature, construction, and validity* of the contract; but the *lex fori*, we maintain governs as to the *remedy*. In support of this position, we refer to the following authorities, viz; *Vermont State Bank vs. Porter*, 5 Day's Rep. 316. *Andrews vs. Herriot*, 4 Cowan's Rep. 508, and cases cited in the note. *Pearsall vs. Dwight*, 2 Mass. 84. *Le Roy vs. Crowninshield*, 2 Mason, 151.

Foreign statutes of limitations belong to the *lex fori*, and are in no case available here; but our own statutes of the kind are applicable to all actions pending in our courts.—*Decouche vs. Lazetier*, 3 John. Ch. Rep. 190. *Nash vs. Tupper*, 1 Cain's Rep. 102. *Ruggles vs. Keeler*, 3 John. Rep. 263. *Pearsall vs. Dwight*, 2 Mass. Rep. 84. *Bryne vs. Crowninshield*, 17 Mass. Rep. 55. *Medbury vs. Hopkins*, 3 Con. Rep. 472. *Harper vs. Houghton*, 1 Har. and John. Rep. 453. *Le Roy vs. Crowninshield*, 2 Mason's Rep. 151. *Bulger vs. Roche*, 11 Pick. Rep. 36.

The statute of New-Hampshire, upon which my learned friend relies, may be likened to a statute of limitations. Indeed, it is nothing more than a statute of limitations. It merely bars the remedy. It has nothing to do with the nature, construction, or validity of the contract.

In support of this position, we have authorities directly in point. In *Lincoln vs. Battelle*, (6 Wendell's Rep. 475,) the court ruled that a law of a foreign state authorizing proceedings calling on creditors to present their demands against a debtor by a specified day, and declaring the effect of omission to be, not only to *take away*

the *remedy*, but to extinguish the debt, will be considered, where there is no insolvency, in the nature of a statute of limitations, affecting the remedy, and not the validity of the contract.—*Prentiss et al. vs. Savage*, 13 Mass. Rep. 20. *Tupper vs. Poor et al.* 15 Mass. Rep. 419. 2 *id.* 89.

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So an insolvent discharge of the person relates merely to the remedy, and if granted in another state or foreign country, it will not, under any circumstances, or in any stage of the cause, be noticed by our courts, or allowed to operate here for any purpose.—*White vs. Canfield*, 7 John Rep. 117. *Tupper vs. Poor*, 15 Mass. Rep. 419. *Watson vs. Bourne*, 10 Mass. Rep. 337. *James vs. Allen*, 1 Dall. 88. *Sicard vs. Whale*, 11 John. Rep. 194. *Peck vs. Harier*, 14 John. Rep. 346. *Whittemore vs. Adams*, 2 Cowan's Rep. 626. *Woodbridge vs. Wright*, 3 Con. Rep. 523. 2 Mason, 151.

Again, the *cessio bonorum* of the civil law has never been considered as an extinguishment of the debt itself.

We have no desire to combat the principle that what discharges and extinguishes a debt in the country where it was contracted, discharges and extinguishes it every where. But we do insist that this discharge, which is available every where, must operate upon and extinguish the debt, not merely bar the remedy, like the statute of limitations, or the statute pleaded in bar in this case. What is there in the New-Hampshire act, which operated upon and extinguished the plaintiff's debt? Nothing, we apprehend. It merely bars the remedy, and nothing more.

There is a large and important class of cases under the *bankrupt laws*, properly so called, by which both the person and the property of the debtor are released from all liability whatever in the country where he obtains his discharge. By the comity of nations, these discharges are respected by foreign tribunals as well as by our own, where they are granted. The case at bar cannot, with any propriety, be likened to a discharge under the *bankrupt laws*. If Gookin's whole estate had been within the control of the probate court in New-Hampshire, and had passed under its jurisdiction, the case at bar would bear a stronger analogy to a discharge under the *bankrupt law* than it now does. In the case of bankruptcy, the whole property of the bankrupt, in whatever country situated, vests in his assignees, and they may sue for and recover it in any country where it happens to be found. In this case, only a part of Gookin's estate was within the jurisdiction of the probate court in N. Hampshire. That portion of it situated in this state, was never subject

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to the jurisdiction of the court in New-Hampshire. The plaintiff, it is true, once had a lien upon Gookin's effects in N. Hampshire, for the payment of his debt. That, he has lost by not exhibiting his demand to the commissioner in New-Hampshire. But how can it be said that he has lost his lien upon other effects of Gookin not within the jurisdiction of the probate court of N. Hampshire? It is true the plaintiff could not prosecute his claim against the estate of Gookin in New-Hampshire, if administration had not been taken here. And it is also true that a creditor here, who did not present his claim there, could not prosecute it there. But a creditor here, although barred by the proceedings there, could exhibit his claim to the commissioners on the same estate here, and the New-Hampshire statute would be no bar. Why, let me ask, should the plaintiff in this case be barred by a statute of N. Hampshire, which would be no bar to the claim of any other citizen in the state?

Smith and Peck for defendant.—1. The plaintiff's claims are barred by the statute of New-Hampshire. The partnership having been carried on in that state—the parties being domiciled there, and the plaintiff having there continued his residence till long after the time allowed for the presentation of claims had expired, the plaintiff has no remedy here save what is founded on the contract made with Mrs. Gookin—he having neglected to present his claims before the commissioner. It is perfectly clear, that no action whatever would be sustained in New-Hampshire for the recovery of any part of the claims embraced in the present suit, as the 7th section of the New-Hampshire act is a positive bar, inasmuch as it provides that all claims which might be, but which are *not* exhibited to the commissioners, “*shall be forever barred.*” How then is this case to be exempted from the operation of the rule that what is a discharge of a contract in the government where it was made, is a discharge every where? This principle is too firmly settled to need the aid of authority: but there are some cases in which this rule is laid down and enforced, that bear so strong an analogy to the case under discussion, that we shall be pardoned for calling the attention of the court to them for a moment.—*Warder & Warder vs. Azell*, 2 Wash. Rep. 282. *Powers vs. Lynch*, 3 Mass. Rep. 77. *Vermont State Bank vs. Porter*, 5 Day's Rep. 316. *Compamp vs. Bunel*, 4 Dall. 419. *Searight vs. Calbraith*, *id.* 325. *Hall vs. Blake*, 13 Mass. Rep. 153. *Vancluf vs. Therason*, 3 Pick. 12. *Talleyrand vs. Boulanger*, 3 Vesey, jr. 446.

Swift, Ch. J., in delivering the opinion of the court in *Vermont State Bank vs. Porter*, says, "There is the same reason that the defendant should have advantage of local laws in his defence, as that the plaintiff should have such privilege in supporting his claim." It was in accordance with this principle that this court, in 1833, in Orange County, in the case of *Knight vs. Kimball*, held that a contract which was discharged by the laws of New-Hampshire, could not be made the foundation of a suit in the courts of this state. That was an action brought on a note, or written contract, payable in specific articles, at the defendant's house, on a given day. Both parties, at the time the contract was executed, and when it fell due, resided in that state. The defendant, on the trial, offered to prove that on the day the contract became due, he had on hand property of the description mentioned in the contract, sufficient to pay it; and that by the *common law* of that state, this was a bar to any suit founded on the contract in their courts. It was ruled that this evidence would have been admissible, and constituted a good defence, if the facts had been specially pleaded. But the plaintiff's counsel endeavored to avoid the effect of the New Hampshire statute by treating it as a limitation act, and they assimilate it to the general statutes of limitation. But the analogy is very distant, if any exists. Acts of limitation rather establish, that certain circumstances shall amount to evidence that a contract has been performed, than dispense with its performance.—(Per Marshall, Ch. J., in *Sturgis vs. Crowninshield*, 4 Wheat. 122.) Or in other words, the law raises the presumption after the statute has run, that the debt has been paid, the evidence of which has been lost. The statute now before the court, does not proceed upon this ground. It declares that the *demand* itself shall be barred if not presented to the commissioners; and this forms a positive bar, and extinguishes the debt.—(*Spalding vs. Butts et al.* 6 Conn. Rep. 28.) The statute of limitations may be avoided by an acknowledgement of the debt; but if an administrator should acknowledge a debt to be due from the intestate's estate, which had not been presented to the commissioners, or even if he should promise to pay it, the operation of the statute in question upon the claim would not be defeated, nor he be personally bound by such promise, unless the promise was founded upon some new and distinct consideration. This shows the statutes are different in their character.—*Brown et al. vs. Anderson et al.* 13 Mass. Rep. 201 *Emerson vs. Thompson et al.* 16 Mass. 429. 3 N. H. Rep. 491.

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But if the New-Hampshire statute is likened to a limitation act, its effect is not obviated; for the plaintiff's *right* as well as his remedy is extinguished. If the *right* was not gone—if the statute was a mere limitation act, and only affected the remedy, the debt, as in other cases, would be revived by a new promise. The rule seems to be this, that when it is the intention of a statute to convert a possession of any given length of time, or a neglect to institute proceedings according to its provisions, into a positive and unavoidable bar, the statute is a bar in the courts of every government.—*Beckford vss. Wade*, 17 Vesey, 88. *Shelby vs. Gay*, 11 Wheat. 361. *Brent vs. Chapman*, 5 Cranch, 358. *Le Roy vs. Crowninshield*, 2 Mason, 151, 167.

The case at bar is more like the case of a discharge under an insolvent law, which is a bar to all contracts existing at the time of the discharge, if the debt was contracted and the parties domiciled in the state where the discharge was obtained.—*Ogden vs. Saunders*, 12 Wheat. 213 and note. *Boyle vs. Zachasir*, 6 Peters. 348. *Sabring vs. Messereau et al.* 9 Cowan, 344, 2 Kent's Com. 324, 12 John. R. 142. 5 Mass. R. 509. 6 *id.* 137. 13 *id.* 1.

But if an insolvent, after he has obtained his discharge, promise to pay a debt included in the discharge, he is bound by such promise, and payment may be enforced. The bar then, presented by the New-Hampshire statute, is of a more positive and permanent character than is to be found in any bankrupt law; and while the effect of the former cannot be avoided by any acknowledgment or promise, the latter may. Yet it is urged upon the court that the effect of the New-Hampshire act is confined to the limits of that state, while the discharge under an insolvent law follows the debtor over the whole world, and protects him in the courts of every civilized nation. A strange doctrine surely! To a foreign contract we cannot plead our statute of usury, because this court does not admit of a defence on the merits which the law of the country where the deed was executed would not allow. The *lex fori* knows not of any bar to the *right*, which does not exist by the *lex loci contractus*. On this principle, a plea of infancy to a note has been disallowed, because not shown to be a good defence when the note was made.—*Thompson vs. Ketcham*, 8 John. Rep. 189.

Where is the difference between a bar from a tender, as in *Warder & Warder vs. Azell*, a bar from infancy, a bar from a discharge under an insolvent law, a bar under the limitation act of Virginia,

as in *Shelby vs. Gay*, and a bar under the New-Hampshire statute? Why is it that any of these bars constitute a defence in the courts of a foreign government? Because they are a bar in the state where the contract was made and was to be performed. Would not the New-Hampshire act form a bar to the present action, if prosecuted in that state? Of this there is no doubt. Why not allow it, then, this effect here?

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This case stands precisely as it would if the plaintiff was still domiciled in New-Hampshire, as his claims were barred when he left the state, and the bar is not avoided by a change of residence. The case comes to this: Can a citizen of New-Hampshire, whose claims are barred by the law in question, come here and have them allowed? Suppose Mr. Fay had not represented the estate to be insolvent, and no commissioners had been appointed, could the plaintiff have sustained an action to enforce payment of the claims now sought to be recovered? It is difficult for us to see how the statute could be avoided; and it is equally difficult to see how the appointment of commissioners alters the case. We are not to lose sight of the fact that the administration here is merely ancillary, and was taken out for the purpose of collecting the debts due the estate, which are to be remitted to New-Hampshire for distribution.

It has long been *vexata questio* whether in such case the funds are to be first appropriated to the payment of home creditors and the balance remitted to the foreign administrator, or the whole remitted in the first instance. But waiving this question, and assuming the ground that the assets are to be applied in payment of the debts of our citizens, the plaintiff gains nothing by the admission, as for this purpose he is not a citizen of this state, and he ought not to be allowed to disturb the settlement here.—*Dawes vs. Head et al.* 3 Pick. 128.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—Richard Gookin having his domicil in Haverhill, in the state of New Hampshire, deceased in the year 1826. Letters of administration on his estate were duly granted in the state of New Hampshire. The estate was represented insolvent, and a commissioner was appointed to receive and examine the claims of the creditors to the estate. The present plaintiff, at that time and until after the commissioner had made his return, in pursuance of the statute of the state of New Hampshire, was a resident in and had his domicil also in the state of New Hampshire. He omitted to present any claim against the estate of Mr. Gookin

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to the commissioner. Afterwards, letters of administration on the estate of Mr. Gookin within this state were granted to the defendant, commissioners were duly appointed to receive and examine the claims of the creditors against said estate, and the plaintiff here presents to the commissioners his claim as a creditor to the estate. The administrator pleads in bar the statute of New Hampshire, and the question is, whether the plaintiff, having neglected to present his claim against the estate in New Hampshire, can be considered as a creditor to the estate, and have his debt here allowed.

The statute of that state provides, that where an estate is represented insolvent and a commission issues, all claims which might be, but which are not exhibited to commissioners, shall be forever barred. The plaintiff was under no disability to present his claim; and further, it appears by the pleadings, that the estate of Mr. Gookin is not in fact insolvent, although so represented. The effect of the statute of New Hampshire on the claim of the plaintiff is now to be considered.

It may here be noticed, that where a suit is had against an administrator, it is of no consequence whether an estate represented insolvent actually proves to be so or not. If other claims are allowed against an estate, except those allowed by commissioners, an estate may prove to be insolvent, when by the returns of the commissioners it would appear to be otherwise. Hence, where an estate is represented insolvent, and settled as such, the rights and duties of the creditors and administrators are the same, whether it is in fact insolvent or not. The averment, therefore, in the pleading, that the estate proved solvent, is to be disregarded.

The general principles of law, which are considered as having a bearing on the question before us, have been settled by repeated adjudications. The difficulty arises from the application of those principles to the case before us. It has become a rule of international jurisprudence, and is settled also as the municipal law of most states, that the *lex loci contractus* governs as to the nature, construction and validity of a contract. From the operation of this rule, it has been considered that a discharge of a debt in the country where it is made, or where it is to be executed, is a discharge every where. The case before us is considered by the defendant's counsel as governed by the application of this rule. It has also become a settled rule of law, that the *lex fori* governs entirely as to the remedy. Whoever comes into another jurisdiction is entitled to all the benefits and subject to all the disabilities, either in enforcing or defending against claims which the persons belonging

to that jurisdiction have or are subject to. Hence a law directing the mode of proceeding, or affecting the remedy alone between creditors and debtors, has no extra territorial force. From this principle it has been held, that the statute of limitation in the country where a debt was contracted is of no force in the state where the collection of it is attempted to be enforced, notwithstanding it in fact extinguishes all remedy in the place where the contract was made. The propriety of the application of the principle to cases of that class was questioned in the case of *Le Roy vs. Crowninshield*, 2 Mason, 151, but it was considered as too well established by authority to be shaken. The plaintiff contends that the statute of New Hampshire only affects the remedy, and for that reason that his claim may be enforced in any jurisdiction, where a suit can be instituted. So far as there is any analogy between the cases which have established these principles and the case at bar, it is apparent to me that this case falls within the former principle; that the effect of the statute of New Hampshire is more in the nature of a discharge of the debt, or an extinguishment of the right of the creditor, than of a mere suspension or extinction of the remedy. It will still, however, remain a question, whether it is such a discharge as we ought to give effect to here.

It has been very justly remarked, that foreign laws are not admitted to have any effect, *ex proprio rigore*, but only *ex comitate*; and that the judicial tribunals are to exercise a discretion wherever a new case comes before them for the application of the principles which have been adopted. Thus while infancy, a tender and refusal, &c., if they constitute a valid defence under the *lex loci contractus*, will be considered as a good defence elsewhere; and also while the bankrupt laws or insolvent laws of a state where they have power to pass them, and no constitutional barrier is overleaped, are respected every where, yet if those laws are manifestly unjust and injurious in their operation on the citizens of another government, the courts of that government will not sanction them. It was asserted by the Lord Chancellor in *Burton, ex parte*, 1 Atk. 255, that an absolute discharge of the effects as well as of the person by a bankrupt law in Holland would be an absolute discharge of the debt, and this assertion has since been settled to be the law by repeated adjudications both in England and in the United States. Yet it has been held, that if a discharge was had under a foreign law, manifestly unjust, and not justified by the law of nations, the courts of England would not regard it. This principle was asserted in the case of *Blanchard vs. Russell*, 13 Mass. Rep. 6, and in

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the case of *Prentiss et al. vs. Savage*, 13 Mass. Rep. 20. The court refused to recognize a discharge obtained under an insolvent law made by the government in the island of Jamaica, upon the ground, that if the law was intended to operate beyond the jurisdiction of the government where it was made, it was evidently partial and unjust, and the principles of comity did not require that it should be regarded. The case of *Lincoln vs. Battele*, 6 Wend. 475, which is so much relied on in the argument, might have been decided on this principle. Of that case, however, it is sufficient to say, that it is not applicable to the case before us. Upon the principle which the court assumed, there can be no doubt of the correctness of the decision. They lay stress on the fact, that there was no insolvency, and no surrender of property, but that the calling in of the creditors was nothing more than a limitation of the remedy. Upon these premises, if the proceedings were in the nature of a limitation, the conclusion from all the authorities on this subject was, that the debt of the creditor was not thereby discharged, but might be enforced by the courts of any other jurisdiction. The arguments of the attorney general in opposition to the decision of the court, it must be confessed, are very able and entitled to great weight.

The statute of New Hampshire, which is in question, is not liable to any objections as either partial or unjust. It is similar in its provisions to the statutes of many other states, and provides for an equal distribution of the effects of a deceased debtor among all his creditors, if there is a deficiency. In its terms it is a complete extinguishment of all right and remedy in that state. The administrator there is not liable to any action after payment of the debts allowed, either in the courts of New Hampshire or elsewhere. For although there has been a decision, that a foreign administrator or executor is liable to be sued in another state, and is accountable for all the assets which come into his hands, unless he has duly administered, yet that decision has been questioned by very high authority, (Story, *de conflictu legum*,) and seems not to be sustained by principle.

The original party to the contract, Mr. Gookin, is deceased, his estate has passed into the hands of his representatives, and as there is no remedy left, either against the person of the administrator or estate, it would seem to follow as a necessary conclusion, that all the debts of the creditors, not presented to the commissioner in New Hampshire, were discharged. It is very apparent that this must be the case, if there were no effects, except in New Hampshire,

where Mr. Gookin had his domicil and where he deceased. For although debts may be said to have no *situs*, but to follow the person of the debtor when living, yet on his decease they must be pursued in the place where he left effects, on which letters of administration are taken, and only in the courts of that place. It is obvious, therefore, that if there had been no property of Mr. Gookin in any other place than the state of New Hampshire, all his creditors must have resorted there to obtain satisfaction of their debts, and could only have a right or remedy according to the laws of that state. The personal estate of the deceased became vested in his administrators, in trust for those to whom it should be ordered, after the payment of the debts ascertained in the mode required by statute, and the real estate descended to the heirs, except so far as it was made assets in the hands of the administrator for the payment of debts. To enforce or collect these claims, the creditors must have resort to the tribunals of that state, prove their debts before commissioners, if the estate was represented insolvent, and be subject to all the consequences attending their neglect so to do. The original claim presented to commissioners and allowed is extinct, becomes merged in a debt of record, for the recovery of which an appropriate remedy is provided, and if not presented, is declared to be forever barred, and no remedy left, either against person or estate.

It is obvious, that the language and effect of this statute is altogether different from that used in ordinary statutes of limitation. In this statute the claim is said to be barred. In the statute of limitations, the language is, that no action shall be maintained. In the statute of limitations, the remedy may be revived by a new promise. The change of residence of the debtor may furnish a new remedy, but in this case the debt is barred, and no suit can be sustained against the administrator.

It is argued, however, that the effect of considering this neglect as a discharge will be, to defeat a mortgage which a creditor may have for the security of his debt. A mortgage is in the nature of a pledge. The creditor holding his pledge may retain it until redeemed. It is not precisely a remedy for the recovery of a debt, though it is sometimes so called, but is a transfer of property, which the person transferring may have again, by paying the sum for which the property was mortgaged or pledged; and although there may be other means or remedies for recovering this sum, yet these may be entirely lost and the pledge remain good. Thus in England, under the bankrupt law, a creditor having a mortgage may

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retain his security, although the debt or sum secured by the mortgage may be effectually gone and discharged by the certificate given to the mortgagor. If the mortgagee proves his debt under the commission, he must surrender his security, unless his security is deficient, when he may be permitted to prove the sum for which the security is deficient, as a debt under the commission.

By the view already taken of the statute of New Hampshire, it is evident that all claims of the creditors, including that of the present plaintiff, were effectually barred. There was neither person or property to which they could resort. The debt, as to every legal effect and operation, was extinguished. The question then will arise, whether a creditor, who has thus suffered his debt to be extinguished, can go abroad and collect his debt in another jurisdiction, where there happens to be property which belonged to the intestate at the time of his decease; and this will lead into a short inquiry into the nature and duty of separate administrations.

It is a principle well settled, that letters of administration issued in one state confer no authority to the administrator to commence a suit in another. If an administrator wishes to collect the funds which belonged to his intestate in another government, he must either take out letters of administration in that government, or collect them through the medium of an administrator there appointed. It is so in England. If an intestate left *bona notabilia* in the two provinces of York and Canterbury, there must be two administrations. An administrator, by virtue of letters granted in Ireland, cannot commence a suit in England. The administration granted in the place where the deceased had his domicil is considered as the principal administration. The administrator there appointed must administer upon all the assets there collected, all he receives from any former administrator, if there has been a previous administration, all he receives or collects by virtue of any authority derived from any other jurisdiction or from any foreign administrator, and after payment of debts, distribute according to the laws of the place where deceased had his domicil.

Administrators appointed in any state other than that where deceased had his domicil, are considered ancillary or subordinate to the principal administrator. Funds are usually collected and transmitted to the principal administrator for distribution. It is not necessary, however, that this should be done, as the courts in the country where the property is situated, having jurisdiction over the same, may make the distribution themselves, and are not obliged to remit to the foreign administrator, having regard in the distribu-

tion of personal estate to the laws of the country where the deceased was domiciled. The duty which every government owes to those who are subject to its jurisdiction, and are citizens thereof, requires that they should protect them. Hence, if debts are due and owing in the country where the subordinate administration is taken out, they will not transmit the funds or make distribution until those debts are paid; they will not and ought not to leave their own citizens to the hazard and inconvenience of proving and receiving their debts in another state, and before the tribunals of that state, but they will first see that justice is done to their own citizens, and then either remit or distribute, as circumstances may require.

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It is not immediately connected with the subject before us, and not necessary, to inquire what proceedings are to be had where an estate is actually insolvent. Justice requires that all creditors should be treated alike, and not that the creditors in one state should receive the whole amount of their demands, and the creditors in another should only receive a partial dividend; and no great practical difficulties suggest themselves to me in effecting this object. As it respects creditors proving their debts in the state where the principal administration is, they are all made equal; they take their dividend of the funds at home, and also of those from abroad. If both are sufficient to pay all the debts, they receive the full amount of their claims. If the estate is insolvent, unless all the creditors, wherever situated, who can legally claim a share, are made equal, they have a better chance of receiving a larger dividend than the creditors living in another government.

Considering the administration where the intestate had his domicil as the principal administration, and that the creditors must resort there for the purpose of substantiating their claims, and that all personal assets must ultimately be transmitted for that purpose to the principal administrator, if the funds collected by the auxiliary administrator are necessary for the purpose of paying debts against the estate, and if not wanted, are to be distributed among those entitled thereto, by the principal or auxiliary administrator, as the courts where the funds are collected shall deem expedient, subject to the claims which the citizens of the government have upon the funds within their jurisdiction; we think the citizens of no other state can come in to claim a share of the funds in the hands of a subordinate administrator, and that the object of a commission in the state where the second administration is granted is only to ascertain the claims of the creditors within that state, who are to be

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paid before the funds collected are suffered to be transmitted ; that to permit any creditor, not living within the jurisdiction where the auxiliary administration is granted, to come in for a share of the effects there found, would be unjust and inequitable, as it respects the citizens of the government where either administration is granted, gives them an undue advantage, and presents great embarrassments in the settlement of estates. And indeed, unless the second administration is thus limited, there can be no good reason why the same creditors may not prove their claims under several administrations, and thus derive an unjustifiable benefit, to the injury of those who are compelled to resort to one fund alone. If an estate is actually insolvent, the claim of a creditor who has neglected to present his claim against the estate where the debtor was domiciled, cannot be allowed to be proved elsewhere without doing manifest injustice to those who have proved their debts, who are of course entitled to all the estate which can be collected through the principal or subordinate administrations ; and as it respects the creditors in the state where the subordinate administration is granted, the claim of a creditor living in the same state where the debtor had his domicil cannot be allowed without depriving them of that portion of the estate of the deceased lying within the jurisdiction of their own government, to which they have a right to resort for the satisfaction of their several claims.

It may be made a question, as to the effect of the question before us, of the constitution of the United States securing to the citizens of each state the privileges and immunities of citizens in the several states. This was not urged in the argument, but we have not overlooked it. Upon this subject it may be remarked, that there are various duties arising out of the relations between a government and the citizens thereof, and various rights, which cannot be equally enjoyed. There are some privileges and immunities, which are necessarily connected with the residence of the citizen, which cannot be enjoyed by those residing elsewhere ; and the right of resorting to the funds of a deceased debtor, within the territorial limits of a state, may be one of these. Further, the government may, if they please, permit an administrator from abroad, either by virtue of letters of administration there granted, or granted by them, to collect all the funds of an intestate, without any regard to claims of their own citizens. It is a matter of discretion in them, whether they will distribute or remit, and a matter of favor to their citizens that they will not remit, until provision is made for satisfying their claims. While, therefore, the citizens

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of each state, are entitled to all the privileges and immunities of citizens of the several states, it does not follow that they are entitled to all the favors which a government may bestow on its own citizens. Hence, while a government or state may refuse to permit the funds of a deceased debtor to be taken from their jurisdiction until the claims of their own citizens are first satisfied, it may permit this to be done without regard to the claims of citizens of other states, without violating the provisions in the constitution before mentioned. All the creditors, wherever situated, have the opportunity of presenting and proving their claims, where the debtor resided, and it is only a matter of accident or favor, if any who neglect the opportunity, have any other means of satisfying their claims.

The result to which we have arrived on this part of the case is, that the plaintiff, having been a citizen of the state of New-Hampshire, at the time of the decease of Mr. Gookin, the intestate, at the time when the commission of insolvency issued on his estate, and until the same was returned, having neglected to present his claim to the commissioners there appointed, and in consequence thereof his claim being barred by the law of the state of N. Hampshire, cannot remove into this state, here prove his debt, and come in with the creditors in this state, for a share of those funds, to which they have a claim for the satisfaction of their debts.

As the defendant, on this part of the pleadings, will be entitled to a judgment, it is unnecessary to consider the other question presented by the pleadings, as to the effect of the contract made between the plaintiff and Mrs. Gookin, in April, 1828.

The judgment of the county court, which was in favor of the defendant, is therefore affirmed.

MATTOCKS, J., dissenting.—I happen to differ from the court in this cause; and as the question decided is new, and of some importance, there may be no impropriety in expressing my dissent. I am with the plaintiff altogether; but as the court have declared in this cause no opinion as to the second ground of defence, that is, the effect of the contract entered into with Mrs. Gookin, I have nothing to say on that point. But the statute of New-Hampshire, I consider as intended to be a mere local regulation, or statute of limitations, as to the settlement of insolvent estates in their own jurisdiction; or if not so intended, should be here so construed. It is a provision in an act for the settlement of dead men's estates,

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different from the common law mode, which would govern if there were no statute, and to settle insolvent estates ordinarily without suits, and to divide the property within their jurisdiction equally. The whole amount of debts, therefore, must be known, before the dividend can be struck; and those that will not, in a prescribed time, exhibit their debts, shall lose their share in the division. And as the demands were to be presented to the commissioners, and not sued, in lieu of saying, like our statute of limitations, that "all actions shall be commenced and sued within such a time, and not afterwards," it says "*shall be forever barred.*"

Our statute, relating to exhibiting claims before commissioners, says, that if any person neglecting, &c., "shall be forever barred from recovering such demand, or from pleading the same in offset in any action whatever."

These different expressions mean the same thing—that the party shall have no remedy to collect his debt. This is what all statutes of limitation mean; and the old distinction between the right and the remedy, seems to be at war with the principle, that where there is a legal right there is a remedy. And within the government where the act is passed, this distinction would be idle. It is intended to destroy the right by cutting off the remedy—the only proper way to effect it. But as to foreign jurisdiction, the statute cannot reach the remedy, and therefore it not only does not, but is no evidence that it was intended to affect the right out of the state. Although there was formerly some decisions to the contrary, it is now well settled, that there is no distinction as to where the parties did or do reside, under the head of a discharge of the contract, by the law of the place where made, being a discharge every where, except only under the clause of the constitution of the United States, prohibiting states from passing laws impairing the obligations of contracts: Under that clause, the supreme court of the U. States have decided, that the insolvent laws of a state discharge only the citizens of that state.—Story's Conflict of Laws, 283, and authorities there cited. So that without regard to the constitution of the United States, this statute, if it discharges any debt, discharges all debts contracted in New-Hampshire, without regard to the residence of the parties. And with regard to the constitution, if the bar or discharge is like a discharge under an insolvent law, it is a discharge of all debts due to citizens of New-Hampshire, wherever the contracts were made, but no bar to debts due to citizens of other states, whether contracted in New-Hampshire or elsewhere.

In *Lincoln vs. Battelle*, 6 Wendall, 475, it was decided, that a

foreign law, purporting to extinguish the debt as well as right of action, there being no insolvency or surrender of property, was in the nature of a statute of limitations, affecting the remedy and not the validity of the contract.

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In 2 Mason, 151, Judge Story, after discussing the subject, says, that if the subject was new, he would hold "that where all remedies are bound by the *lex loci contractus*, there is a virtual extinction of the right in that place, which ought to be recognized by every other tribunal as of equal validity;" but admitted and decided the law to be otherwise. That distinguished Judge has lately published his Commentaries on the Conflict of Laws, which probably had not come to hand when the case was argued, or it would not have escaped the attention of the counsel. The 14th chapter of this very learned work, which treats of jurisdiction and remedies, is very satisfactory to my mind, that although the learned Judge has had, and perhaps still has, an individual inclination that the law should be different; yet there are no authorities, English or American, for adjudging any foreign supposed statute of extinguishment, to be other than a statute of limitations. And the admission of so great a judge, that the law is different from what he seems to desire it to be, is to me very convincing. The author, after speaking of the contrary opinion of some continental authorities, says, "The doctrine of the common law is so fully established on the point, that it would be useless to do more than to state the universal principle which it has promulgated; that in regard to the merits and rights involved in actions, the law of the place where they originated is to govern. But that all forms of remedies and judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicil of the parties, the origin of the right, or the country of the act." He shows that the case of *Melan vs. Fitzjames*, 1 Bos. & Pul. 138, where the defendant was discharged from arrest, because upon that contract, he could not have been arrested in France, where it was made, was a mistaken decision, and has been overruled. I will now transcribe his concluding remarks, which apply most directly to the question in controversy in this case, supposing the statute of New-Hampshire was intended to extinguish the debt: It is somewhat long, but in my view very valuable. P. 487, the whole of Sec. 582.— "But although statutes of limitation or prescription of a place where a suit is brought, may properly be held to govern the rights of parties in such suits, or as the proposition is commonly stated the recovery must be sought and the remedy pursued within the time pre-

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scribed by the *lex fori*, without regard to the *lex loci contractus*, or the origin of the cause, yet there is a distinction which deserves consideration, and which has often been propounded. It is this: suppose the statutes of limitation of a particular country do not only extinguish the right of action, but the claim or title itself, *ipso facto*, and declares it a nullity after the lapse of the prescribed period, and the parties are resident within the jurisdiction during all that period, so that it has actually operated upon the case, may not such a statute be set up in any other country to which the parties remove, by way of extinguishment or transfer of the claim or title? This is a point which does not seem to have received as much consideration in the decisions of the common law as it would seem to require. That there are countries in which such regulations do exist, is unquestionable. There are states which have declared, that all right to debts due more than a prescribed term of years, shall be deemed extinguished; and that all titles to real and personal property, not pursued within the prescribed time, shall be deemed forever fixed in the adverse possession. Suppose for instance (as has been) personal property is adversely held in a state for a period beyond that prescribed by the laws of that state; and after that period has elapsed, the possessor should remove in to another state, which has a longer period of prescription; could the original owner assert a title there, against the possessor, whose title, by the local law and the lapse of time, had become final and conclusive before the removal? It has certainly been thought, that in such a case, the title of the possessor cannot be impugned. If it cannot, the next inquiry is, whether the bar of a statute extinguishment of a debt, *lex loci*, ought not equally to be held a preventory exception? This subject may be thought by some to be open for future discussion. But it should be stated, that as far as the decisions in the American courts go, they do not sustain the distinction. In all the cases however in which the point has been discussed, the statutes under consideration did not extinguish the right, but merely the remedy."

From this I understand that the notion of making the supposed distinction, so far from being established by the English courts, that they have scarcely thought it worthy of consideration; and that in America, the author supposes that no case has occurred, where the court considered that any statute meant to extinguish the debt. But that in the cases upon statutes of limitation which have arisen, this distinction has not been countenanced by the courts.— There is, therefore, to say the least, an absence of all authorities in

support of it. That adverse possession of personal property, during the time required by a statute, will give title, has indeed been decided in *Brant vs. Chapman*, 5 Cranch, 358; and in other cases on the same principle. That fifteen years adverse possession gives title to land under our statute, and if the question of land title could be tried out of this state, the decision would likely be the same, as the manner of acquiring or transferring the title to property. It is the inherent right of every government to prescribe; and when acquired, the right to it is not local, but the right to extinguish a contract, although it may be a kindred question, is not by the author himself considered the same.

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I am not satisfied that the New-Hampshire act is a statute of extinguishment: I regard it as of the same nature as a statute of limitations; and that if it did purport to extinguish the debt, I am not prepared to sanction such an attempt by any other state or kingdom. Neither authorities, justice, or comity, in my view, requires us to go that length. I see no way consistent with the now settled law, to make any distinction between citizens of New-Hampshire and this state, or other states; and it would seem invidious to attempt it. The language of the statute comprehends all; and it is not pretended the constitution of the United States affects this case. The circumstance of the creditor's being in New-Hampshire is of no importance. And to allow the citizens of Vermont to present their claims here, and not those of New-Hampshire, is, in my view, without any good reason; and would equally exclude creditors dwelling in New-York or Massachusetts; and the inconveniences of these exclusive and particular allowances, near the lines of the state, where creditors reside, and property real and personal is often owned by the deceased in two states, especially where there is an actual insolvency, would be very great, and what is believed has not hitherto been understood or practised. But each creditor has exhibited his claims, where he chose; at least, so far as to elect which jurisdiction. And it may often happen that an estate is insolvent where a person dies but only over the river, solvent, and perhaps rich; and why not permit the claims to be allowed, in all places, where there is estate, and a representation of insolvency? And then all the dividends may pay the whole; and if any neglect in any place, they lose the dividend there, if a claim can only be presented in one place: then if this plaintiff had presented his claim, and it had been allowed in New-Hampshire, he would clearly have avoided the supposed extinguishment or bar of the statute; but if the estate there had paid but a portion of the debt, he would have been barred here, because he had complied with the statute there.

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It would seem that the law of the domicil of the deceased should only govern the payment of his debts in that government; but the law of the *situs* should govern as to the allowance of the debts, as it does the distribution of the property among the creditors in case of insolvency, such as the priority of debts. And although the administration taken out where the domicil was, is called the principal, and others ancillary or auxiliary, yet it is rather a verbal than a real distinction; for the debts and effects are often chiefly in other jurisdictions than that of the residence. And the general policy as well as justice of the law, at least in New-England, is to apply the property of the deceased to the payment of the debts before the heirs are let in; and to effect this, the proceedings must in some manner be *in rem*. And although a man must die *somewhere*, he may own property and owe debts *every where*. And in this country, where we have so many separate governments, it is of great importance that no new and additional embarrassment should be interposed to the collection of debts against deceased persons, as the delays and shifts of those who settle estates are already very discouraging to creditors. And the general utility of a principle should be very clear to induce a decision that may do very great injustice in particular cases, as I fear it will in this.

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After verdict in an action of ejectment, if the lands are so imperfectly described that it cannot be known for what the verdict was given, the judgment should be arrested.

This was an action of ejectment for lands in Clarendon.

The plaintiff offered evidence tending to show a title in the plaintiff, and that the defendant was in possession.

The defendant then offered a deed from plaintiff to him, of certain land in Clarendon, dated 1st May, 1807, accompanied with evidence tending to show a possession in himself of the north half of the Kenny farm and the land east of the same, together with the second piece of land described in said declaration, lying north-east of the north half of said Kenny farm, accompanied with evidence tending to prove that the plaintiff said he meant to include said second piece, and would deed the same.

The court decided that any acceptance under these circumstan-

ces would not entitle the defendant to claim said second piece, and that the same was not included in the deed from the plaintiff to defendant.

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The defendant also contended that the deed should be so construed as to include the land lying directly east of the north half of that part of said Kenny farm lying west of the highway, and also the second described piece, having been occupied by said defendant, and lying adjoining the land admitted to be in the defendant;—that the court should have left it to the jury to determine whether the plaintiff meant to convey by said deed said second piece.

The court also left it to the jury whether the land lying directly east of the west part of the said Kenny farm was intended by the parties to be included in said deed.

The defendant, after judgment on the verdict in this cause, moved the court in arrest of judgment for the uncertainty and insufficiency of the plaintiff's declaration. The court refused to set aside the judgment.

The following is the description of land in the plaintiff's declaration :

“Bounded on the south by the farm formerly owned and occupied by Elisha Clark, now the property of B. R. Clark; east by Silas Green's farm; north and west by the same land on which the said Harry resides. Also, one other tract or parcel of land, bounded east and north by Silas Green's home farm; south by the land which Elisha Clark deeded to Harry Clark; west by Asa Chaffee's home farm.”

Royce and Strong for defendant.—The court erred in refusing to arrest the judgment.

1. Because the verdict, if it gives the plaintiff any land, gives him one acre, which appears by the deed, and was admitted on the trial to be the land of the defendant. This appears from an inspection of the deed and plan.

2. The declaration, in attempting to describe the first piece of land, does not describe any land as appears from an inspection of the declaration and plan.

3. If the declaration, in attempting to describe the first piece of land, does describe any land, the description is so vague that judgment ought to be arrested.

There are a variety of authorities from the 30th of Eliz. (A. D. 1589) to the 47th Geo. (A. D. 1807) going to establish the principle that the description ought to be so definite that the sheriff can, without any guide, give possession of the land.—*Austin et al.*

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Cro. Eliz. 116. *Wood vs. Payne*, Cro. Eliz. 186. *Goodtitle vs. Wallace*, 2 Strange, 834. *Makefar vs. Hapwood*, 1 Barnes' Notes on C. P. 117. 3 Wils. 23. *Bradshaw vs. Plowman*, 1 East. 441. *Wright vs. Otway*, 8 East. 357.

The following cases are referred to, as bearing upon the same point.—3 Mod. 238. 11 Co. 55, *a*. 1 San. 188. Owen, 93. 1 Sid. 295, 340. 2 Roll. Abr. 448.—See also *Jackson dem. Moore vs. Bergen*, 1 John. Cases, 161. *Talbot vs. Wheeler*, 4 Day, 448.

In the case — vs. *Whitney & Dyer*, decided in Rutland County, January Term, A. D. 1819, (not reported) judgment was arrested for the uncertainty of the description in the declaration, which was in these words: "Fifty acres of the south side of the said Cleves' home farm in Clarendon, it being the same farm on which the said Cleves now lives."

Smith and Thrall for plaintiff, contended,

I. The declaration is sufficient.

1st. The premises are described in the common and usual manner, and the sheriff might even find the land without resorting to the parties.

2d. The jury returned a special verdict. The defendant submitted to it, and the plaintiff is entitled to his writ of possession for the land specified in the verdict. If the declaration is too loose, it is cured by the verdict.

3d. In a præcipe in a real action, which is a formal writ, precision was requisite, because it was necessary to follow the form prescribed in the register, though the same strictness was carried into the action of ejectment when first introduced. Yet the more modern rule is, the plaintiff shows the sheriff, and takes possession at his peril; and if he takes more or other land, he is a trespasser, and would be liable to an action; or the court, in a summary way, will set it right.—1 Swift. Dig. 650. 1 Whea. Sel. 590. Adams' Eject. 20, 21, 24, 25. [Remington's Eject. 123, 128, 129. *Collingham vs. King*, 1 Burr. 628. *Conner vs. West*, 5 do. 2672. *Porter vs. Morgan*, Cro. Eliz. 465. 4 Day. 448.

II. The decision of the court, on the construction of the defendant's deed, is correct.

1st. There is no pretence for saying the deed included the piece of land lying north-east of the Kenny farm.

2d. The parties having divided the western and wider section

of the Kinney lot in the centre, the east and narrow section must also be divided in the centre ; and the defendant can only claim the land lying east of one half of the narrow section.

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3d. Whether the parties did or did not intend to include in the deed the land claimed by the defendant, and lying south of the narrow section of the Kinney lot, was submitted to the jury, and the jury have found the fact against the defendant.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—In this case, several questions arose on the jury trial. There was also a motion in arrest, which was overruled. The ground of this motion is, that the premises in the plaintiff's declaration are so described, that it cannot now be ascertained for what the recovery was had. We have not examined particularly the questions which arose on the jury trial, as we are decidedly of opinion, that the motion in arrest should have prevailed. The action of ejectment in England, is solely a possessory action, and determines nothing more than the right to possession, at the time of the demise laid in the declaration. In this state, the declaration counts upon a seisin in fee, and the judgment rendered thereon is conclusive against both the plaintiff and defendant and their heirs. It partakes so much of the nature of a real action, that a greater degree of certainty is required in the description of the land, than would now be required in England. While the action of ejectment was compared to a real action, as great a degree of certainty was required, as in a *præcipe quod reddat*. While the *præcipe* was used only in an adverse suit, and in the action of ejectment, it was considered as necessary to give a description sufficiently certain and particular, to enable the defendant to know for what he was called into court, and against what he was to defend. It was formerly considered that the description must be so certain, that the sheriff might know of what to deliver possession ; and although the rule, which requires this strictness, has been in some measure relaxed, yet it is still necessary, that the premises should be so described, as that the defendant may be able to ascertain what is sued for, and that the plaintiff may be able to point out the land recovered to the sheriff, who may execute the writ of possession. It would undoubtedly be sufficient to designate the land sued for, as a lot of such a number, or a division laid to a particular right, or by any description by which the particular location could be ascertained, but a description as a lot containing so many acres, a close, or piece of land without any words to designate the particular

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close, or piece, would not answer. A reason is given, why the practice, as to making a particular description, has been altered, that the sheriff now delivers possession according to the directions of the plaintiff, and if he takes possession of more than he recovers, the court will, in a summary way, correct the procedure. For the same reason, it is necessary that there should be such a description, either in the declaration or in the verdict, that the court can ascertain by the proceedings before them, for what the recovery is had, and rectify the proceedings if the plaintiff takes possession of too much. In this case, the description is so vague and indefinite, that the plaintiff cannot ascertain for how much, or what particular land, the jury intended to find a verdict. The court have no means of ascertaining, except by inquiring of the same jury who returned the verdict, to what part of the land, in the possession of the defendant, the plaintiff made a title. The declaration fixes the south boundary with sufficient certainty, as the land sold by the plaintiff to, and occupied by Burr R. Clark. The east boundary is sufficiently definite, to wit, on the farm of Silas Green : But the north and west boundary is the land on which the defendant resides. The action supposes the defendant in possession of the land claimed by the plaintiff, and his possession extended south to the land of Burr R. Clark, and east to Silas Green's farm. It will be difficult to find a boundary between the possession of the defendant and the land of Burr R. Clark, if the possession of the defendant extended to that line. It is very apparent, therefore, that there is no land described in the declaration. It is impossible to ascertain for how much the recovery was had, or to what the plaintiff made title. If the plaintiff should direct the sheriff, in executing a writ of possession on the judgment, he might take possession of ten, twenty, or any indefinite number of rods north of Burr R. Clark's land ; and if he took possession of more than he was entitled to, the court could not relieve, as they could not ascertain for how much the jury intended to find a verdict. The special verdict was only for the land west of a certain road, but does not obviate the difficulty arising from the imperfect description of the north boundary. The case of *Arnold* against *Whitney & Dyer*, decided in this county in 1817, (not reported) is an authority directly on the question before us. That case was decided after an argument, and after several decisions had been made to the same effect. The judgment was there arrested for an uncertainty in the description, not as vague or indefinite, as the description in this declaration.

The judgment of the county court is reversed, and the judgment arrested.

CHARLES H. BUCKLIN vs. ELISHA WARD.

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When a proceeding depends upon the discretion of the county court, guided by the particular circumstances of the case, and not on any certain known rule of law, this court will not control it.

Where a declaration, before a justice of the peace, states a note payable to A. B. or bearer, and when appealed, the plaintiff files his declaration, omitting "or bearer," the suit will not be dismissed for a variance.

The assignment of a chose in action for a valuable consideration is a sufficient consideration for a promise of the debtor to make payment to the assignee.

This was an action of *assumpsit* upon a note, commenced before a justice of the peace, and came into the county court by appeal. The declaration before the justice, stated a note payable to one James W. Ward or bearer, and that said note was assigned over and delivered to the plaintiff, who was the bearer, and entitled to recover the same; and that the defendant had due notice of said assignment, and thereupon promised the plaintiff to pay the amount of said note to him, but refused, &c.

In the county court the plaintiff declared as upon a note payable to James W. Ward, omitting "or bearer," but stated that the note was transferred to the plaintiff by endorsement, of which the defendant had notice; and that when presented to defendant for payment, in consideration that the plaintiff was owner of the note, and justly entitled to recover the amount thereof, promised to pay the same to the plaintiff, but refused, &c.

The defendant moved to dismiss the declaration filed in the county court for its variance from the declaration before the justice. This motion was overruled by the court, to which the defendant excepted.

The defendant then demurred to the sufficiency of the declaration, which was likewise overruled; to which the defendant excepted.

Upon these exceptions the cause came here for revision.

Clark and Ward for defendant.—1. The declaration does not state any consideration for the transfer of the note from the payee to the plaintiff.

The words "value received," are insufficient as the averment of a material fact in the plaintiff's declaration, and must be construed as terms merely descriptive of the instrument by which the assignment is supposed to have been made; the instrument of assignment not being a deed, does not imply or import any consideration.

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It may be evidence of consideration sufficient between the parties, but is not sufficient to charge a third person.

2. The declaration does not state an express promise unequivocally from the defendant to the plaintiff, but seems only to raise it by implication.

3. The facts set forth in the plaintiff's declaration do not, in law, amount to a sufficient consideration to uphold an express promise to pay the plaintiff, inasmuch as there is no benefit to the promisor nor prejudice to the promisee. As a general legal proposition, it is no benefit to the promisor that the promisee has bought himself into the rights of his creditor, unless the money is so advanced as to give to the debtor or promisor the defence of payment to any action afterwards brought upon the debt or note. In this case the plaintiff or promisee, by taking an assignment of the note, has taken care not to impart that advantage to the defendant.

The prejudice the plaintiff may have suffered by his own act (and as a general truth it cannot, as matter of law, be determined whether the plaintiff or promisee has been prejudiced or benefitted) and without any reference to the defendant, and without his request, is an executed and void consideration to uphold a future promise.

The case of *Moar vs. Wright*, 1 Vt. Rep. p. 57, is well decided on another ground.

Another objection is to a variance between the declaration filed under the rule of the county court, and the declaration before the justice, changing the cause of action.

The object of the power to amend pleadings and process is to prevent a writ of error, or cure some defect of substance or error of form which might be reached by general or special demurrer, and is limited in its exercise by the English courts to cases where there is something to amend by.—1 T. R.

The court will not suffer a good writ to be amended to adapt it to another purpose, but only where bad and vicious on the face of it. See Jacobs's Law Dictionary, p. 88, title amendments.

The statute of this state uses the term amend in the same relative sense, as implying something to be amended. See statute, chapter vii. sec. 51, p. 75.

The rule of the county court, permitting the plaintiff to amend as a matter of course in appealed cases, is only one mode of exercising the power conferred by the statute, and must be subject to the same limitation. It was intended to ensure the regularity of process in courts of record, and not to alter the rule of jurisdiction.

The declaration before the justice is the document to amend by. In this sense the rule has been expounded.—*Carpenter vs. Gookin*, 2 Vt. Rep. 495.

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Harris and Howe for plaintiff.—The contract set forth in the declaration is founded upon good and sufficient consideration. It is alleged to consist in the assignment of the note by James W. Ward (the original payee) for a valuable consideration, with an order of payment to the plaintiff, and notice thereof to the defendant, which imposed upon the defendant an equitable and legal obligation to pay to the plaintiff.—1 Vt. Rep. 58, *Moar vs. Wright*, and the authorities there cited.

The defendant incurred an obligation which a court of law will enforce, and such as he cannot evade, and from which he cannot be released, except by the assignee.—Vt. Rep. 168, *Lampson vs. Fletcher*. Distinct and undoubted moral obligation to pay a debt, is a sufficient consideration for an express promise; but when a legal liability exists, and the promise is to do what the law will enforce, such promise most clearly gives a right of action.—1 Vt. Rep. 420.

The opinion of the court was delivered by

MATTOCKS, J.—The first question presented is, whether the declaration, which the county court permitted the plaintiff to file, was so far variant from the declaration before the justice, that this court will consider that as error, and review the judgment. In describing the note which was the inducement to the promise declared upon before the justice, it was stated to have been payable to James W. Ward or bearer. The amended declaration made the note payable to James W. Ward, omitting “or bearer.”

In *Carpenter vs. Billings*, 2 Vt. R. 495, it is stated by Prentiss, J., that “When a proceeding depends upon the decision of the county court, guided by the particular circumstances of the case, and not on any certain and known rule of law, we have no control over it.” In the same case it was decided that an amendment cannot be granted, which changes the form of the action, or introduces a new count for a new cause of action. Most other amendments it is competent for the court, in their discretion, to make, and when made, they are not revisable by this court. The present was a plain case of an ill description before a justice, in one particular, of a note described, though not declared on, and when the plaintiff filed his declaration in the county court, he was permitted to describe the note truly, to prevent a variance. This was correcting

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a clerical error, which it would be proper to allow in any stage of the proceeding, the note being the document to amend by.

As to the sufficiency of the declaration, which is raised by the demurrer, that is settled in the case of *Moar vs. Wright*, 1 Vt. Rep. 57, when this subject was most ably discussed by the judge who delivered the opinion, to which little could be added, and nothing is required.

The judgment of the county court is affirmed.

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PROBATE COURT vs. JUSTUS ROGERS *et al.*

When the supreme court, upon the petition of the heirs of an estate, on the ground of fraud, accident or mistake, order an appeal from the decision of commissioners, allowing a claim to be entered in the county court, which is accordingly done by the clerk, whereupon the claimant files his declaration and proceeds to prosecute his suit from term to term, and finally suffers a non-suit, he cannot afterwards sustain an action against the administrator for the original allowance of commissioners, although no record of an appeal appears in the probate court.

In such case, the order of the supreme court, to the court below, to enter the appeal, vacates the allowance of commissioners.

To the statement of the case incorporated into the opinion of the court, it may be necessary to add, that from the pleadings it seems, that the defendant, who was administrator on the estate of Barker at the time this claim of Jarvis was allowed by commissioners, entered an appeal, but afterwards caused the minutes thereof to be erased; that Jaazaniah Barrett, Jr. and his wife, who were heirs of the estate, supposing such appeal would be prosecuted, omitted to enter one in their own names; that the supreme court, upon petition of the said Jaazaniah and wife, on the ground of fraud, accident or mistake, permitted them to enter an appeal and prosecute the same in the name of the administrator, and that the appeal was accordingly entered by them.

Royce and Smith for plaintiff.—The plaintiff insists, that the proceedings in the county court were extra judicial and not binding on him.

1. Because the record set forth in the plea in bar does not show that the defendant ever took his appeal from the probate court.

2. The court will take notice of the records of the under court. It appears that the cause was entered by its title, in the usual way,

by the clerk, whereupon the creditor filed his declaration, but finding no record in the probate court, he might well suppose the claimant had abandoned his claim, and would pursue his claim no further in a court where the defendants had leave to enter their appeal, but had not done so.

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The second plea in bar does not aver, that under the issue the merits of the claim were adjudicated upon, and as this was regarded as not being the main question to be tried before the court, and it does not appear that the debt has been satisfied, the court will permit the plaintiff to reply to that plea, and not defeat a large claim.

*R. H. Thrall, for defendants, contended—*1. That there having been an appeal taken in point of fact by the administrator from the allowance of such claim, and the administrator having omitted to prosecute the same, and the said Jaazaniah and wife having been permitted to prosecute the same in the name of the administrator, it was unnecessary to enter such appeal anew in the probate court, that it was sufficient to enter the same in the county court, and that the judgment on such appeal, so certified to the probate court, must be final and conclusive.

2. That after leave so given by the supreme court as aforesaid to pursue such appeal and enter the same, if the claimant goes forward, files his declaration, prosecutes his claim, and takes repeated trials, without objecting to the manner in which said cause is brought before the court, the court will intend that every thing has been done to properly bring the parties before the court, or that, at all events, if such be not the case, all objections are waived by the parties so appearing.

The opinion of the court was delivered by

MATTOCKS, J.—This was an action of debt upon bond, and the breach assigned was, not paying a sum allowed the plaintiff by the commissioners on the estate of Erastus Barker, deceased, as ordered by the judge of probate, of which estate, the defendant, Rogers, was the administrator, and who pleaded three pleas in bar. The two first were alike in substance, and stated that he represented Barker's estate as insolvent, and commissioner's were duly appointed, and allowed the plaintiff the sum by him claimed, and returned their doings to the probate court, which were approved and allowed; and that afterwards one Jaazaniah Barrett, Jr. and Sally Barrett his wife, she being the daughter and heir at law of Erastus Barker, petitioned the supreme court for leave to enter an

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appeal from said probate court against said allowance, for the reasons therein set forth, they having been prevented taking an appeal, by fraud, accident or mistake. Whereupon said petition was granted by the supreme court, and it was ordered that they be allowed to enter their appeal in the county court on condition that they give bonds as surety for costs to said Jarvis in the sum of \$100, which condition being complied with, said Jarvis came into court at the April term, 1828, and filed his declaration against said Justus, administrator of said estate, to which the said Justus duly pleaded; whereupon such proceedings were had in said cause, that after the same had been twice before the supreme court, and remanded to the county court, by granting new trials, at the September term, 1831, of the county court, the said Jarvis became non-suit in said cause, and the said Justus recovered his costs; and the said court ordered the proceedings to be duly certified to the probate court, which was done before any order to pay said sum allowed by the commissioners was by the probate court made.

The third plea alleges that the said Jarvis, in the name of one Chester Spencer, impleaded Jaazaniah Barrett, Jr. who had signed the same note that was originally allowed by the commissioners with said Howe, before the county court, April term, 1828; and such proceedings were had, that at the April term, 1830, said Barrett recovered a judgment in his favor against the plaintiff for his, the defendant's cost; and the said Justus makes a profert of said several judgments and proceedings. To which the plaintiff replies, that there is not any record of said supposed recovery, non-suit, judgment, appeal, and other proceedings in said several pleas mentioned, &c. Upon the inspection of the records produced, the county court adjudged that there were such records, and now upon an appeal they are submitted for our decision.

That there are such records in form, is not denied, but there are several objections to the effect of them in point of law. First, as to the record of the proceedings mentioned in the two first pleas. It is objected, that there is no record of any appeal in the probate court, and in the county court there was only the name of the action on the docket, with no files or record to support it; and therefore, although the plaintiff filed his declaration and proceeded to several trials, at last, finding no copies in the clerk's office to support an appeal, he had a right to treat the proceedings as a nullity, suffer a non-suit and resort to the original allowance before the commissioners. The 93d section of the probate act allows a creditor to appeal from the disallowance of any claim to the amount of

§20. The 94th section allows the party aggrieved to file objections to the allowance of any claim, which is to operate as an appeal; and in both cases the creditor is to file his declaration in the county court, upon which the trial is to be had; and the 96th section declares, that if the administrator declines or is interested, any creditor, heir or legatee may file objections to and defend against any claim on such estate; and it is added, "and every creditor, legatee or heir, appealing from or filing objections to the determination of commissioners, or defending against any claim, shall give bonds," &c.; and the statute No. 41, relating to judicial proceedings, authorizes the supreme court to "sustain any petition for an appeal, or for leave to enter an appeal from any judgment of any county court, or from any order, sentence or decree, of any probate court, or from any determination of commissioners on insolvent estates, in cases only which by law are appealable, in any case where the petitioner has been prevented from taking or entering an appeal by fraud, accident or mistake." Under this law, the heir of the intestate and her husband petitioned the supreme court for relief, and the court sustained the petition, "and it was considered by the court that said petitioners be allowed to enter their appeal from the decision of the commissioners in the county court," at the April term, 1828. The propriety of this decision has not been questioned in the argument. As the supreme court had jurisdiction of the subject, their decision was conclusive, and they might well have considered, that although the objecting to a claim is to be by filing objections, and appealing in terms is only where a claim is disallowed; yet it is in the nature of an appeal, and may fairly be considered as coming within the spirit of this remedial act.

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The petition upon which the order was granted stated as a reason, that the petitioners, in the name of the administrator, had taken an appeal; but that the administrator, without their knowledge, had abandoned said appeal, and caused the minutes thereof to be erased. The record now produced from the county court is entitled, *Leonard Jarvis vs. Administrator of Erastus Barker, appellant*, and recites, that at the April term, 1828, said Jarvis came into court by his attorney and filed his declaration, which is recited, and then follows the after proceedings as before stated. The authority of the county court clerk to enter an appeal or action was, the order of the supreme court. As there once was an appeal allowed by the probate court, it might have been proper for the appellant to have produced a copy also of that; but if that had

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been erased, it no longer existed, and could not be produced, and then it would be as if the petition and order had been "for an appeal;" in which case nothing but the order of the supreme court could be produced or acted upon by the clerk. But all this inquiry comes the "day after the fair." As the appellant had authority to enter his appeal, and did in fact enter the action, and the plaintiff, in lieu of objecting for want of copies, or any other formality, impleaded the defendant by filing his declaration, and went down and then up to various trials for three years, and at last suffered judgment against him by non-suit; and then says there has been no entry of an appeal, and therefore the original allowance of the commissioners remains as a valid judgment. This is quite preposterous, as the court had jurisdiction of the subject matter and sustained the appeal. Then the judgment below was vacated, and the creditor has no debt of record. It is not upon the ground, that the plaintiff's debt has been extinguished by a judgment upon the merits, for it was a judgment of non-suit, that the plaintiff is not entitled to recover; but because the judgment below was vacated by the appeal, and the moment so much was done in the county court as was required by the order of the supreme court to perfect the appeal, then the finding and allowance by the commissioners, as accepted by the probate court, became vacated, and the order of the judge of probate upon the administrator to pay the sum allowed by commissioners, which was made after the proceedings of the county court had been certified to him, was utterly void.

As we find there are such records as are alleged in the two first pleas, which decides the cause for the defendants, it is of no use to speak of the third plea.

Judgment of county court affirmed.

**TILLY GILBERT, Executor of CATHERINE MINOT, vs. Heirs of
MEHITABLE L. RICHARDS.****ROTLAND,
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1835.**

A legacy to three sisters of the plate, musical instruments, pictures, &c. which belonged to their father, gives them a joint tenancy in the goods bequeathed.

Where two of the legatees died in the life of the testatrix, held that the legacy survived to the remaining legatee, and did not pass to the residuary legatee, under a bequest of the residuum and of all lapsed legacies.

The following case stated shows the manner in which this cause was brought up, and the facts upon which the opinion of the court was founded.

Mrs. Minot, by her will, gave and bequeathed to Elizabeth Swan of Boston, Sarah C. Thomas of New York, and Mehitable L. Richards of Westhaven, Vt. her step-daughters, the several articles of plate, the pictures, paintings, musical instruments, and household furniture, which their father, her late husband, Christopher Minot, brought from Boston, or such parts thereof, as should remain at her decease.

After the execution of the will, which was in June 1826, and previous to the making of the codicil thereto, which is also made a part of this case, Elial Gilbert one of the devisees in the will, also Charles Rice and Polly Rice two of the children of Abigail Rice, also devisees in the will, died; and Mrs. Swan and Mrs. Thomas, two of the legatees in the will, also died.

Tilly Rice, only remaining child of Abigail Rice, and one of the devisees in the will, is still living, also Dorothy Banister and Abigail White, both of the state of Massachusetts, two of the legatees in the will, are still living.

Polly Rice was the wife of Clement Smith, and left four children.

Mrs. Mehitable L. Richards survived the testatrix, but died soon after. The appellees are heirs and representatives of Mrs. Richards.

By the codicil, *all lapsed legacies* are given to the executor in the will. From the opinion of the court it appears also that the codicil makes the executor the residuary legatee. The executor, in rendering his account to the probate court for settlement, gave himself credit, the sum of \$278,86, it being two thirds of the appraised value of the above mentioned legacy to Mrs. Swan, Thomas and Richards, the executor claiming the same by virtue of the codicil.

This item was disallowed by the probate court, and from this sentence or decree of the said probate court, the executor appealed to this court.

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The question presented to the court is, whether the appellees are entitled to the whole of the said articles of plate, pictures, paintings, musical instruments, and household furniture, given by the will to the said Mrs. Swan, Thomas, and Richards, or the executor, to two thirds thereof, by virtue of the codicil?

Buel & Ormsbee, for the heirs.—That the decree of the probate court, in disallowing the item with which the executor in his account credits himself as property belonging to himself (the same being a portion of a specific legacy given by the will to Mehitable L. Richards, Elizabeth Swan, and Sarah C. Thomas, the said Mehitable being the only one of the said legatees surviving the testatrix) is correct—Because—

1. The legacy being a legacy of specific articles to three legatees, without any words of severance, does not lapse by the death of any one or two of the legatees, but is a joint legacy, and by the "*jus accrescendi*" vests in those of the legatees who survive the testatrix.—Litt. 282. Co. Litt. 182, a Bl. Com. vol. 2, 399. Chitty's note on same page. Mad. Ch. vol. 2, 82. Rep. on legacies, vol. 2, 260. Kent's Com. vol. 2, 283—2 P. Will. 347—same 529, 1 Ver. 482.—*Shore vs. Billingsley*. Thos. Jones Rep. 162. 2 Ch. Cas. 64. 4 Bro. C. C. 15, *Campbell vs. Campbell*. 3 Ves. 628, *Motly vs. Bird*, 632. 6 Ves. 130—9 same 197, *Crook vs. ———*. Vt. Stat. 177. Kent's Com. vol. 4, 357. 2 vol. Caines Cas. 326.—*Cuyler et al vs. Bradt. et al.*

2. With reference to supervisorship where the legacy is joint and vests at the death of the testator, it is immaterial whether one of the legatees dies before or after the testator, the inchoate and contingent right survives when the vested and absolute right would survive.—Rep. on legacies vol. 1, 330. Ambl. 175 and 136. 2 Atk. 220. 3. Ves. 628. 2 P. W. M. 347. 1 Dickens' Rep. *Keys vs. Luffkin*. 6 Ves. 130. 3 Bro. 465.

3. The decree of the probate court is in accordance with the intention of the testatrix, so far as that intent can be gathered from the will and codicil.

Smith & Andrews, contra.—It is well settled by the English law, that if a devise, or legacy, specific, or otherwise, be given to two or more, with words indicating the intent that the legacy should vest in all, and yet the *jus accrescendi* should not attach, in such case, the legatees should be considered as *tenants in common*.—1st P. W. 700—do 96—2 do 280. 1st Salk, 227. Croke Eliz. 695. 1 Atk. 592. 3 Bac. Abr. 199—198. 1 Brown, 118—23.

Ves. 272-315. 3. Ves. 204. 2 Stra. 905. 1 Atk. 494-495. 6 Con. Eng. Chan. Rep. 66-5 do. 173. 3 Ves. 628-631. Madk. Chancery, 2d. vol. 23. 1 Salk, 391. 3 P. W. 115. 2 Strange, 807. 2 Merriode, 70.

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It is equally well settled by the English law, that if the *jus accrescendi* will attach during the life of the testator, in the event of the death of one of two or more legatees or devisees, it will attach subsequent to his decease.—1 P. W. 96. 4 Bro. Cases, 242. 3 P. W. 115. 1 Salk, 229.

It is obvious from the above positions that the *jus accrescendi* which attaches to joint legacies is the same incident, and founded by analogy on the same principle which attaches to joint feoffments or grants.—Coke Littleton, 282, a 2 Black 399.

The origin of this estate—3 Bac. Abr. 204. 12 Mod. 303.—It was favored by the ancient law.—4 Ves. 630. 1 Salk. 392. 2 Black, 193. 2 Ves. 559.

But since the stat. of 12 Car. 2d, not favored even in England. 1 Wiles, 165. 1 Salk, 158.

Tenancies in common preferred by the English courts.—4 Ves. 551. 1 Brown, 118. 3 Ves. 631. 2 Mad. Chancery, 96.

The spiritual court of England does not allow of survivorship as between legatees.—2 P. W. 115. 1 Chan. Cases, 238.

It is a principle exceptionable in itself, has no foundation in natural justice, makes no provision for posterity, and often works great injury.

Such part only of the common law of England, is adopted here “as is applicable to the local situation and circumstances” of this state.—Vt. stat. 57. 2 Peters, 144.

The reasons for the existence of joint tenancies in England, have no operation in this country.—2 Hammond, 305.

From the earliest period of our history it has been discontinued. Plymouth colony in 1643—4 Kent, 362. See note.

It is wholly inconsistent with the spirit of our laws and the genius of our institutions, and has not been favored by the laws of this country.—4 Kent, 361. 1 Mason, 224. 1 Root, 48. 1 Swift, 102. 5 Con. 365. 4 Day, 401. 2 Hammond, 305. 3 Pick. 360. 5 Mass. 522. 5 Binney, 16. 2 Kent, 350. Vt. Stat. 176-7. 1 Rev. Stat. N. Y. 1st vol. 727. See 44.

It is obvious that the rule of construction in relation to the creation of joint estates, is different in this country from the English rule. This is true of deeds as well as wills.—12 Mod. 296. 1 Wills, 341. 5 Con. 362. 9 Pick. 39.

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Survivorship is not allowed in a joint mortgage.—3 Mason, 378,
Randall vs. Philip.

The importance of this rule in conveyances of *personal* estate is as great as it is in *real*.—2 Mad. Chan. 96, note e.

Never any good reason for the application of the principle of survivorship to personal estate. It was derived by analogy from similar estates in real property as the term *tenants* shows. All the real property, by the policy of the laws of England is supposed to be granted by, dependant upon, and holden of some superior lord, by and in consideration of certain services to be rendered by the tenant.

Supervisorship not allowed in *Lex Mercatoria* Coke Lit. 182.

Nor in stock owned and used jointly on a farm.—2 Black. 399.

No joint tenancy in a pecuniary legacy.—1st of Brown, 118.
1 Equity Abr. 292. 3 Chan. Rep. 214.

It is a fundamental maxim, upon which the construction of every will must depend, that the intention of the testator, as disclosed by the will, shall be fully and punctually carried into effect.—3 Cranch, 133. Some of the most difficult questions upon which courts have to decide arise from the construction of wills, the general rule, &c.

In ascertaining the intent of a particular clause, it is competent and proper to take into consideration every part of the will, and the circumstances, both of the property and the parties under which the will was made.—11 Pick. 376.

The nature of the legacy.

The situation of the legatees.

Evident, in this case, that the testatrix intended one third for each legatee.

A joint possession could not have been intended, consequently, not a joint estate. For separation of possession destroys such an estate,—4 Kent, 363.

A testator always contemplates the supervisorship of all devisees in the will and intends an interest to vest in all. The testatrix so intended in this case—one third to each. There is not the least evidence to the contrary, except what is furnished by the use of phraseology, which in the English law has a fixed, technical meaning, and which meaning, we have shown, is not necessarily attached to it in *this* country.

Most certainly, when joint tenancies in real property, are regarded so unfavorably by the laws of the land, and especially by the laws of this state, this court will not favor such estate in personal property, in which, no reason founded in justice or policy even, could ever be discovered.

It is unnatural to put a construction upon a clause in a will, making provisions for children favorable to a joint tenancy—5 Binney, 16. In that case Ch. J. Hilgham remarks, that when a man is providing for his children by his will, nothing can be more unnatural than an estate in joint tenancy.

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From the existing circumstances, when the codicil was made, it is evident, the testatrix referred to the portions of the only legatees deceased, at that time, when she gives all *lapsed legacies* to her residuary legatee. Mrs. Minot says in her codicil, she intends to alter her will in relation to the devise to Elial Gilbert and in *other respects*. The devise to the children of Abigail Rice and the legacy in question must be intended to make the language consistent.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—This case comes before us on an appeal from the court of probate. Mrs. Minot on 24th June, 1826, made her will, wherein she gave and bequeathed to her step-daughters, Elizabeth Swan, Sarah C. Thomas, and Mehitable L. Richards, a legacy which is set forth in the case agreed on by the parties.—In the life time of Mrs. Minot, Elizabeth Swan and Sarah C. Thomas, deceased. Subsequent to their decease, the testatrix made a codicil, wherein she gave to her executor, Mr. Gilbert, all lapsed legacies; and also made him her residuary legatee. He was made executor by the original will. On presenting his account to the court of probate, the executor, Mr Gilbert, asked an allowance of the sum of \$278,86, being two thirds of the value or amount of the legacy bequeathed by Mrs. Minot to her step-daughters before mentioned, the children of Mrs. Minot claiming that it belonged to him by the will, as a lapsed legacy. This claim was disallowed, and an appeal taken by the executor. The case involves the construction to be placed on the clause of the will before mentioned. It is contended on the one side, that the whole legacy belongs to the representatives of Mrs. Richards, by virtue of the *jus accrescendi*; and on the part of the executor, that the testatrix intended by the will to give to the legatees, Mrs. Swan, Thomas, and Richards, a tenancy in common, in the several articles therein bequeathed. It is an admitted principle, that in the construction of wills, it is the duty of the courts at all times, to give effect to the intention of the testator, when it can be done, consistent with the rules of law. The intention of the testator has been (not unaptly) called, the pole star, by which the courts must steer, in construing a will. Yet the intention has to be ascertained, and is frequently controlled

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by technical rules, and by the interpretation, which the law places upon technical expressions. By the application of these rules, it has sometimes been the case, that the wishes of a testator have been entirely frustrated, that is, the intention has been declared by the operation of the rules of law, to be different from what was known to be the real design of the testator. We must, however, in the construction of all instruments, apply to them the known and established principles which have been settled, and take it for granted that every person executing a written instrument, is acquainted with the rules of construction which the courts adopt, and that they frame their instruments accordingly. The inquiry in the present case is, whether the testatrix intended to constitute the three sisters, joint tenants, or tenants in common. If they were joint tenants, the *jus accrescendi* attaches by the operation of the law; and we are not at liberty to disregard the intention ascertained by the rules of law applicable to the case, for fear of consequences. If they were joint tenants, it is immaterial whether one or more of the legatees died before or after the death of the testatrix, the survivor at the death of the testatrix takes the whole. Among the rules laid down, we find none better established or more fully recognized than this, that when a legacy is given to two or more, and there are no words of severance, it is held to be a joint tenancy, subject, however, to certain exceptions; and although it is true, that courts will lay hold of almost any words to make a tenancy in common where it is manifestly for the interest of the legatees, yet if there are no such expressions they must consider that a joint tenancy was intended. Now I do not know that we are at liberty to disregard the rules of common law on this subject, upon principles of policy, or to say that they are contrary to the genius of our government; nor do I know that they are contrary either to policy or the genius of our government. If our legislature has altered the doctrine of the common law upon this subject in relation to real estate, a court may not go further, and alter it also in relation to any other estate. The legitimate rule upon this subject would be, that if the legislature has altered the common law in relation to real estate, and not as to personal, they were satisfied with the law as it was, in regard to personal estate. Words, by the common law, are construed to create an estate in joint tenancy, rather than in common; because it is considered as most beneficial to the tenants, and therefore they shall take a joint estate rather than an estate in common, unless words are introduced to manifest an intention to the contrary. And here, for the same reason, it is enacted that the

same words shall constitute a tenancy in common. But the statute has gone no further, and has adopted no such principles for the construction of wills or other conveyances of personal estate. The various exceptions which have been introduced to the general rule, as it respects legacies, prove the rule. None of the reasons which induced the courts to make these exceptions, will apply to a bequest similar to the one under consideration. This was a specific legacy of property which could not well be divided equally, such as musical instruments, pictures, and paintings. The principles of law before referred to, should therefore govern in construing this legacy to be a joint tenancy. From an examination of the will, it is apparent that the testatrix, or the person who drew her will, perfectly understood the language proper to be used. Both in her will and in the codicil she uses the appropriate expression, where a tenancy in common was intended. And from her using the expression in the one case and not in the other, the only legitimate inference is, that she intended the rule of law upon this subject should be adhered to. At the time the codicil was made the testatrix was undoubtedly aware of the decease of several of the legatees, and she was therefore desirous of altering her will, both in respect to the devise to her brother, Elial Gilbert, and also in *other respects*. She provides specially for the property which she had before devised to him, as well as for the property devised to the children of her sister Abigail, two of whom were dead. It is not to be believed that she intended to alter the bequest already made to the children of her husband, by the general bequest of *all lapsed legacies*, or of the residue of her estate to Mr. Gilbert, the executor. She would undoubtedly have mentioned that legacy particularly, had she intended that any part of it should go to him.

I have already remarked that, from the nature of the property, it was to be inferred that a joint tenancy was intended, the property was not capable of a just and perfect division. Although the value of it might be estimated by appraisers, at so much in cash, and the value of the different articles, so appraised, might have been divided into three parts. Yet it is evident that the value, either to the testatrix or legatees, could not be estimated in cash. A piece of plate—a musical instrument—a family portrait, or picture, would derive its value in a great measure from other than pecuniary considerations. It was, therefore, altogether desirable, that these sisters should have the property as joint owners, and that it should not be subject to a division. And furthermore it is not to be believed, that at the time of the making of this codicil, when two of

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the sisters were deceased, that the testatrix could have intended that this property, so valuable to the children of her husband and of so little comparative value to any one else, should be divided between the surviving daughter of her husband and a relation of hers, not of kin to that daughter. If such was her intention it should have been plainly manifested, and not left to be inferred from general terms. Whatever opinion, therefore, we may form of the wisdom or propriety of the rule of law which governs this case, we cannot but be satisfied that its application to this particular legacy, is both right and proper, and that the testatrix was aware of it at the time she made the codicil.

The decree of the court of probate is therefore affirmed.

DAVID G. McCLURE vs. OBADIAH WILLIAMS.

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Where the maker of a note infected with usury, in consideration that the holder should cancel or discharge the same, promises to give a new note, deducting the usurious excess, such promise will be enforced in law.

This was an action of assumpsit. The declaration consisted of two special counts and a general count. The evidence offered in support of the general count was the same as the facts detailed in the two special counts. The court decided that the evidence offered was insufficient to enable the plaintiff to support his action; whereupon the plaintiff entered non-suit, under a rule that the plaintiff have leave to move in the next supreme court for leave to set aside said non-suit, and for a new trial.

The declaration was as follows:

"In a plea of the case for this, that the said Obadiah, at Middletown, aforesaid, to wit, on the 15th day of October, A. D. 1831, being indebted to the said David in divers large sums of money, specified in certain promissory notes, one dated April 1, 1821, for sixty dollars; one dated April 1, 1821, for one hundred and twelve dollars; one dated May 5, 1825, for thirty dollars and fifty-three cents; and one dated January 11, 1828, for ten dollars and twenty-four cents; which said notes had been changed for others, to wit, for one note dated September 1, 1831, for three hundred dollars, for one note dated September 1, 1828, for fifty-three dollars and seventy-nine cents; also for one note dated September 1, 1828, for thirty dollars, and two others of the same date for thirty dollars; the said Obadiah, in consideration that the said David would give up all of said notes not before given up to the defend-

ant, and would discharge him, the said Obadiah, from all liability thereon, and would expunge and deduct from said last mentioned notes all illegal interest and all interest in any way reserved more than six per cent on said notes and on the said sums of money so originally loaned by the said David to the said Obadiah, agreed to give the said David a new note for the said sum that should so be found due after all illegal interest had been so deducted as aforesaid, as soon as the computation necessary to ascertain the amount of unlawful interest could be made, and the sum expunged ascertained, said computation to be made by Orson Clark; and said computation having been made by said Orson, and the amount due after deducting all illegal interest having been ascertained to be, errors excepted, two hundred and fifty eight dollars and eighty-three cents, on the said 15th day of October, A. D. 1831. The said David, at various times, and particularly on or about the first day of March, A. D. 1832, offered said notes to said Obadiah and offered to discharge said Obadiah from all liability on said notes, if he would execute a note to him, the said David, for the last mentioned sum aforesaid, or such sum as should be proved due by the said Orson Clark, after expunging all unlawful interest as aforesaid, as by his said agreement the said Obadiah was bound to do. And the said Obadiah refused and neglected to execute said note for the said sum of two hundred and fifty-eight dollars and eighty-three cents, or for any sum, whereby the said Obadiah become, was and is liable to pay the said David the said sum so found due on said first mentioned notes, deducting all illegal interest therefrom, and being so liable, then and there promised to pay the same, yet refuses. Also for this, that the said Obadiah, at Middletown aforesaid, to wit, on the 15th day of October, A. D. 1831, being indebted to the said David in divers large sums of money, specified in certain promissory notes, in which illegal interest had been reserved. In consideration that the said David would agree to deduct and abate all the illegal interest from said notes and discharge the said Obadiah therefrom, and would deduct and abate all illegal interest from said notes and would discharge the said Obadiah therefrom, agreed to and with the said David to pay him the said sum that should remain and be found due on said notes, after deducting all illegal interest reserved on the same, and to pay the same in one year therefrom, and to execute a note to the plaintiff to that effect; and the said David then and there agreed to deduct and abate all illegal interest from said notes and discharge the said Obadiah therefrom, and the said David has offered to deduct and abate all illegal interest from said notes, and to discharge said Obadiah from said notes, and ever since said agreement, has been ready and is now ready so to do; by reason whereof the said Obadiah became, was and is liable to pay the said David the said sum remaining due, after deducting said illegal interest, and being so liable, to wit, on the 15th day of October, promised to pay the same."

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Mr. Ormsbee for plaintiff.

Mr. Clark for defendant.

The opinion of the court was delivered by

MATTOCKS, J.—If a note has been given upon an usurious consideration, and afterwards by consent of the parties it is given up, the contract rescinded and a new note taken for the sum really due, it was never doubted but what the new security was valid. In the case of *Edgell vs. Stanford*, 6 Vt. Rep. 551, it was, after a very full investigation, decided, that when a note not tainted with usury was given up for a new one that was so infected, and the last having been avoided by a plea of usury, the first note, or the debt for which it was given, was revived, or regarded as not extinguished, and the plaintiff entitled to recover such debt. Although this decision certainly lessens the power and tenor of the statute, yet the conclusion the court came to was irresistible from the authorities, both English and American. It goes upon the settled doctrine, that to constitute usury to avoid the debt, the corrupt agreement must have been at the inception of the contract; for however thoroughly it is concocted afterwards, it does not reach back, as no subsequent violation of the law will make the contract usurious *ab initio*. Therefore, although it is contrary to the statute to take over six per cent. interest on a legitimate note, yet doing so inflicts no vital injury to the note or contract itself. The plaintiff then, if he had declared upon the parent notes, which were pure, and which the corruption of the offspring has not reached, might have recovered, he making the necessary averments to let in the secondary proof, or for the money which was the consideration of the notes, under the general count, upon the authority of the case cited, provided the last notes had been avoided by a plea of usury. In this case there is no count upon the notes but a general count, which will cover the money lent, for which the first notes were given; and therefore the only question upon this count is, whether the second notes being still uncanceled and unavoids, will vary the case upon principle.

As an usurious note is only void at the option of the debtor, ordinarily it would be premature for the creditor to blacken his own note, when it looks fair upon its face, and it is not known that the debtor means to resist the payment; and therefore he should not resort to his first security when the second is in life. But when it has appeared that the last note was always void, then it appears that it could not be payment, satisfaction or discharge of the original

debt. Now take the facts stated in the special counts, which the plaintiff offered to prove under the general count, to wit, that the parties agreed that the notes were usurious, that the excess should be deducted and the notes given up to be cancelled, upon the payment of the true sum which the defendant promised to pay. This would seem to be tantamount to a refusal to pay the whole of the notes, and a mutual rescinding of the unlawful contract contained in the notes, and in this equitable action of money had and received, entitles the plaintiff to recover his original debt, as if no notes had ever been given. And why are not the special counts good? If the usurious notes had been cancelled, and a new note taken for the true sum only, there would be no doubt neither in law nor in justice. The offence consists in taking unlawful interest. The contracting to take or accept was never a crime. The making the contract void, not only as to the interest, but as to the principal, is *in terrorem*. The lender is regarded as the seducer, who from his superior power and art, has his victim at his mercy. Yet if he relents before the deed is done, the crime is not perpetrated. The contract declares only the intent. Taking the money is committing the crime. Between them is the *tempus penitentiae*. If then he repents, although it be from fear, and stops after the first, the last will never come, and therefore he retreats in time. The taint of usury is indeed upon him, but if the borrower promises to pay the honest debt, why is not the promise binding? The cash lent is still due and unpaid, and therefore as much a moral right and duty as a sum justly due on a note against which the statute of limitations has run, or that has been discharged by a certificate of bankruptcy; and no reason is perceived why the promise need be in writing in this any more than in those cases. In those cases, the original contract or note having been valid, it is declared upon, and the new promise removes the bar. Here the new promise is declared upon, because the first security was void, and the second good, which some judges have intimated should be the mode in case of a new promise, which avoids the statute of limitations.

The practice of taking usurious interest, if viewed in the true light, the distress and injury it produces in society, is a great crime against the public good; and in my individual opinion, it would have been better if the statute had been extensive enough to destroy all remedy in every shape where there was the least tincture of usury in any part of a contract. But such has not been ours nor the English statute upon this subject, nor the decisions upon them; and as the statute is, if a man who has a legal right to insist

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on usury and defeat the creditor of his whole debt, chooses to waive this advantage, and promises to pay the *bona fide* part of the demand, we think such a promise can be enforced in accordance with the principles of the decisions upon this subject.

Judgment of county court reversed.

BENNINGTON COUNTY.

FEBRUARY TERM, 1835.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*
 " " STEPHEN ROYCE,
 " " SAMUEL S. PHELPS, } *Assistant Justices.*
 " " JACOB COLLAMER,
 " " JOHN MATTOCKS, }

ABNER HILL *et al.* vs. TOWN OF SUNDERLAND.

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The county court have power to issue an execution on the decree of road commissioners, at the petition of a majority of the former petitioners.

Other persons signing said petition is immaterial, and their names may be erased by order of court.

In such case the execution is to issue for the money to be paid into the clerk of the court, and the county court will appoint an agent to expend the money upon the road or bridge, under the general power of the court.

This was an application to the county court for an execution against the town of Sunderland. The road commissioners, on proper application, had, in 1828, laid out a certain road in Sunderland, and ordered the same made in 1829. The town having neglected to make it, the commissioners, on proper application and notice, in 1831, made an order and decree that said town pay to the clerk of the road commissioners three hundred and twenty-five dollars for the purpose of making said road, and that an extent issue to collect the same with costs then taxed. This decree lay unexecuted until March, 1834, when this application was made in writing to the county court that an execution might issue to collect said amount and costs. This application was signed by a majority of the former petitioners to the road commissioners, but not by all. It was also signed by some other persons. In the county court application was made to erase the names of those other persons, which, though objected to, was allowed by the court; and said court also allowed this petition to be amended by inserting an

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averment that certain of the former petitioners were dead, and others removed from the state. The county court ordered execution to issue against Sunderland, though some of the former petitioners, who are still living in the county, did not join in this application. To which proceedings in the county court the town excepted, and thereupon the cause passed to this court for revision.

Sargent for the town of Sunderland.—The case shows a petition of certain persons for an execution against the defendant town.

The petitioners claim to be the persons aggrieved by the non-payment of the amount of an extent formerly issued by the road commissioners and not executed.

The petition is doubtless intended to come under the statute of 1833.

It becomes important, then, to inquire who the petitioners are, and what claims they have, beyond any other class of citizens, to call for the defendant's money.

They are not the road commissioners, to whose clerk the money was ordered to be paid by the extent.

They are not the committee, who were to take and expend the money in building the road.

They are not exclusively the persons who originally petitioned the road commissioners for the extent.

Should *Jonas Elliott* and *Joseph Burton*, who were two of the petitioners for the extent, come to the court with their petition, associating such others as should see fit to join them, they would come with the same claims, and upon the principle with the present petitioners. When they get into court, so many as dislike litigation could ask leave to withdraw, and to be consistent, the county court must grant the request.

This would be a convenient mode of getting out of a lawsuit, when it begins to look desperate.

When persons have assumed the character of plaintiff in a judicial process, and thereby brought the defendant into court, we submit whether the court can exercise the power of permitting them to withdraw at pleasure. Are they not bound to stay in court and await the event, and abide the effect of such judgment as shall be rendered? Are they not responsible to the defendant for costs, in case it shall be found they have no right to prosecute?

If the court can permit any number of plaintiffs to withdraw from court, upon the same principle they may let out the whole.

Again: we insist that the government, if any one, is entitled to the execution, for it is for the benefit of the citizens of the state at large that the money was appropriated.

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A set of irresponsible citizens are claiming an execution to enforce a large amount of money from the citizens of Sunderland.

What is to be done with the money when collected? Certainly the sheriff must pay it to any one of the petitioners who shall demand it, however dishonest or insolvent he might be; and who shall guarantee that the money will not be squandered? Who shall appropriate it to build the road? The committee expired with the road commissioners.

The case is doubtless one for which the legislature can provide an adequate remedy; and until that is done, it is believed the proceeding cannot be sustained.

Smith for the petitioners.—1. The petition was properly amended.

2. It is not necessary that all should have joined in the petition.

3. The petitioners are entitled to execution.

The opinion of the court was delivered by

COLLAMER, J.—By the system of road commissioners, that board were vested with authority to decree upon a town a sum with costs for the making or repairing a highway or bridge, on the application of petitioners, and issue extent therefor; which it appears was done against Sunderland in 1831. In November, 1831, that system of road commissioners was repealed, but in that repealing act it was provided that the act should “not be construed to affect any proceeding, or liabilities already commenced or incurred” under this system. This repealing act took effect in December, 1831. After that time no board of road commissioners existed, to which committees of appeal could make report, nor clerk of the board, to issue execution or extent on the unexecuted judgments or decrees of the board, thus preserved in force by the repealing act. In November, 1832, the legislature by act provided that the clerks of the county courts should be clerks of the board of road commissioners, to receive reports, complete records and issue extents or executions, as he might have done had he continued in office. Under this act the clerk could have issued execution in this case, but more than a year and a day had expired, and many such cases existed. In October, 1833, there was further provision that in all cases of an order or decree by the road commissioners

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for damages or costs, or for a sum of money to repair or make a road which remained unsatisfied, the person or persons in whose favor said judgment or decree existed, might apply by petition to the county court for an execution for said amount with costs, which said court were authorized to issue. By these acts, this business is transferred to the county court as a part of their jurisdiction of a court of sessions. When a court or other body is invested with a power, the *mode* of exercising it, unless specially provided for, follows as a necessary incident. The orders and decrees of road commissioners for making or repairing a road or bridge, or decreeing a sum of money for such a purpose, was for the *public service*, and had not the statute of 1833 regulated the mode of proceeding, the course would have been by information from the government attorney for an extent, or by presentation by the grand jury; for wherever there is a *public duty* neglected, there must be a corresponding *public remedy*. But the statute of 1833 has so far regulated the course of proceedings in this case, as to say the execution shall issue by the county court on the petition of "the person or persons in whose favor the judgment or decree is made." This is sufficiently satisfied by the petition being made by a majority of those persons, as the public interests must not fail from the negligence or obstinacy of an individual. That other persons unnecessarily affixed their names to this petition, was entire surplusage:—useless there, no injury was done by their erasure.

Much is said about this execution requiring the money to be paid to these applicants. This is an entire misapprehension of the system and its objects. Had the clerk of the road commissioners issued execution, it would have required the payment of the money to him, to have been expended on the road, under the direction of the committee of the commissioners. The clerk of the county court is now the substitute, and should issue execution for the money to be paid in to him; and the county court, as the court of sessions, to whom is transferred the power of carrying into effect the decrees of the road commissioners, will, in pursuance of the power of the commissioners, and in pursuance of the power vested in them by statute, in other cases, of laying out money assessed on towns, appoint an agent or committee to lay out this money on this road.

The judgment is affirmed, but execution will issue from this court for the costs of this court only. The county clerk will issue execution on the judgment below.

STATE vs. GILES BACON.

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Every material fact to constitute the crime must be alleged in an indictment, with *time and place*.

In an indictment for false tokens and swindling, *the procuring the goods* is a material fact, and if not alleged with time and place, judgment will be arrested.

This was an indictment as follows :

The grand jurors within and for the body of the county of Bennington, now here in court duly empannelled and sworn, upon their oath present, that Giles Bacon, of Sunderland, in the county of Bennington aforesaid, being an evil disposed person, and contriving and intending by fraudulent, swindling and deceitful practices to obtain and procure the money, goods and chattels of Fowler W. Hoyt and Isaac N. Janes of Manchester aforesaid, and to defraud the said Hoyt and Janes of the same, on the seventh day of January, now last past, at Manchester aforesaid, with force and arms, did falsely and fraudulently furnish one Joseph Day of Sunderland aforesaid, the said Joseph Day then and there on the day and year last aforesaid, being poor and insolvent, and wholly unworthy of trust or credit, with the sum of five dollars in current bank bills, and did then and there counsel, advise, and procure the said Joseph Day, by means of paying the said sum of five dollars to the said Hoyt and Janes, and by falsely and fraudently representing himself to the said Hoyt and Janes to be a person worthy of trust and credit, to obtain and procure for the use and benefit of the said Giles Bacon, one new saddle of the value of ten dollars, and the said Joseph Day then and there in pursuance of the said counsel, advice and procurement of the said Giles Bacon, by falsely and fraudulently representing himself to the said Hoyt and Janes to be a person worthy of trust and credit, and by paying to the said Hoyt and Janes the said sum of five dollars so furnished the said Joseph Day by the said Giles Bacon as aforesaid, and by making and delivering to the said Hoyt and Janes his the said Joseph Day's promissory note for the further sum of five dollars, which said promissory note he the said Giles Bacon then and there knew to be of no value, he the said Giles Bacon did obtain and procure of the said Hoyt and Janes the saddle aforesaid, of the value aforesaid. And the Jurors aforesaid, on their oath aforesaid, further present, that the said Giles Bacon, by the fraudulent swindling and deceitful practices aforesaid, the aforesaid saddle of the money, goods and chattels of the said Hoyt and Janes did fraudulently and deceitfully obtain and procure, contrary to the form of the statute

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And the jurors aforesaid, upon their oath aforesaid, do further present that the said Giles Bacon, being an evil disposed person, and contriving and intending by fraudulent swindling and deceitful practices, to obtain and procure the money, goods and chattels of Jesse Lapham and Peleg Nichols, of Danby, in the county of Rutland, and Daniel Curtis, of Dorset, in the county of Bennington aforesaid, and to defraud the said Lapham, Nichols and Curtis of the same, on the 16th day of January, now last past, at Dorset aforesaid, with force and arms, did falsely, fraudulently and deceitfully furnish the said Joseph Day, the said Joseph Day then and there being poor and insolvent, and wholly unworthy of trust, with the sum of eleven dollars in current bank bills, and did then and there counsel, advise and procure the said Joseph Day, by means of paying the said sum of eleven dollars to the said Lapham and Curtis and Nichols, and by his the said Giles Bacon fraudulently, falsely and deceitfully representing to the said Lapham and Curtis and Nichols, that the said Joseph Day was worthy of trust and credit, to obtain and procure for the use and benefit of the said Giles Bacon, one cooking stove of the goods and chattels of the said Lapham, Curtis and Nichols, and of the value of twenty-four dollars, and the said Joseph Day then and there, in pursuance of the aforesaid counsel, advice and procurement of the said Giles Bacon, and by the said Giles Bacon's falsely, fraudulently and deceitfully representing to the said Lapham, Curtis and Nichols, that the said Joseph Day was a person worthy of trust and credit, and by his the said Joseph Day's paying to the said Lapham, Curtis and Nichols the said sum of eleven dollars, so furnished the said Joseph Day by the said Bacon as aforesaid, and by making and delivering his the said Joseph Day's promissory note to the said Lapham, Curtis and Nichols, for the sum of eleven dollars and fifty cents, which said promissory note he the said Giles then and there knew to be of no value, the said Giles did obtain and procure of the said Lapham, Curtis and Nichols the cooking stove aforesaid, of the value aforesaid. And the jurors aforesaid, on their oath aforesaid, further present, that by the fraudulent, swindling and deceitful practices aforesaid, the aforesaid cooking stove of the money, goods and chattels of the said Lapham, Curtis and Nichols, the said Giles Bacon did fraudulently and deceitfully obtain and procure, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

After trial, and a verdict of guilty, there was a motion in arrest filed for the insufficiency of the indictment, which motion was overruled by the county court; to which exception was taken, and the cause passed to this court.

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Smith and Robinson for the respondent.—The indictment is insufficient upon four grounds.

1. There is no allegation in the indictment that the respondent, at the several times he furnished Day with money, knew that Day was insolvent or unworthy of trust or credit. The allegation in the indictment, that the respondent knew that Day's note was of no value, is not equivalent to a direct and positive averment that he knew Day was insolvent and unworthy of trust and credit. A note may be of no value for other causes than the insolvency of the maker, as the want of consideration or usury. In an indictment, the want of a direct allegation of any thing material in the description of the substance, nature or manner of the crime, cannot be supplied by any intendment or implication whatsoever.—2 East. 20, per Lawrence, J. 2 Hawk. Ch. 25, S. 60.

2. There is no *venue* to some of the material allegations in the indictment. Every act, material to constitute the offence charged, must be alleged to have been done at some place. The delivery of the note, and the obtaining of the property, were material allegations, and required a *venue*.—1 John. Rep. 71, 75. *People vs. Bennett*, 5 T. R. 162.

3. The indictment contains no allegation that the acts were done by the respondent with the intent to defraud these persons of their property. All precedents of indictments for obtaining money by false pretences, contain an allegation of the intent with which the acts charged were done.—4 Wenth. P. C. 78. 3 T. R. 98.

Where an act in itself, indifferent if done with a particular intent becomes criminal, then the intent must be alleged and proved. 3 Vt. Rep. 110, *State vs. Lovett*. So an indictment for passing counterfeit money must contain an allegation of an *intention* to pass *knowing* the same to be counterfeit.—2 Aik. Rep. 89. 2 Chitty C. L. 762, 768. 1. do. 191.

4. The truth of the pretences is not negatived by special averment.—*King vs. Perrott*, 2 Maul and Selwin, 379. 9 Wend. 182. American Jurist, No. 20, 370. 2 Chitty C. L. 762, 768, 769. 2 Maul and Sel. 379.

State's Attorney, in argument.—This indictment, in form, corresponds with approved precedents.—3 Chitty's Crim Law, 767—

BENNINGTON, 9. It contains all the necessary averments required by the authorities.—1 Chitty's Crim. Law, 187.

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The opinion of the court was delivered by

COLLAMER, J.—This indictment is founded on the 30th section of the act for the punishment of high crimes. "If any person shall by false tokens, messages, letters, or by other fraudulent, swindling or deceitful practices, obtain or procure from any person any money, goods or chattels." This much resembles the English statute, 80 Geo. II.

Every indictment must contain direct allegations, with *time and place*, of every fact necessary to constitute the offence. To bring this offence within this statute, there are three material and important features to be distinctly presented: 1st, The false tokens, messages or letters which were used, stating what they were—(Chitty, 999.) 2d, A direct allegation of their falsity. It is not enough to state generally that they were false.—(Chitty, 999.) 3d, That by these means property *was obtained*, stating where, what property, and when and where obtained.

It is complained that this indictment is defective in all these respects, and moreover does not allege the *intent* of the respondent. It is doubtful whether this is necessary, under our statute. This is unlike the statute in relation to having counterfeit bills *with intent* to utter them, as there the intent is part of the definition of the crime. Our statute, on which this indictment is founded, says nothing about *intent*; the 30th Geo. II. makes that part of the definition of the offence. Hence such an allegation might be necessary in England and not here. Without now inquiring whether this indictment is sufficient in relation to the description of the false tokens and their untruth, &c. we will only examine it in relation to the last requisition. It constitutes the gist and gravamen of the crime that the money or goods of another should be *obtained* or *procured* by the fraud; and it must appear by the indictment when and where they were procured. Otherwise it is impossible to say whether the court has jurisdiction of the crime. Now this indictment is entirely destitute of any allegation when or *where* the stove or saddle were procured, or whether it was ever in the county of Bennington. It shows no offence in the state or county where the indictment was found.

Judgment arrested.

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The rules of court, as to the time of pleading, are matters to be regarded in that court only. Their enforcement or dispensation cannot be assigned for error.

A variance between the declaration before the justice and the new declaration filed in the county court, is no cause of abatement.

Every case passing to the supreme court on exceptions, is to be considered as a proceeding in error, and decided on *inspection of the record*, not in the nature of a motion or petition for new trial. Hence the questions of fact cannot be re-examined, whether found by the jury or the court on an issue of fact.

When a count in *general assumpsit* may be used.

When goods are purchased, and the purchaser reserves to himself the right to pay in certain property, lumber, produce, &c., he may pay within the time without demand or designation, and if not paid, the creditor may sustain an action on book or *assumpsit* without demand.

This was an action of *assumpsit*, to which the defendant plead the general issue with notice, with plea in offset, and issue to the court.

The plaintiff, to support his declaration, claimed for the sale of a double harness, sold and delivered by him the plaintiff to the defendant, on or about the 6th October, 1831, and evidence was introduced by plaintiff, tending to show that he, the plaintiff, sold such harness to the defendant on or about that time.

On the part of the defendant, it was claimed that the said harness was paid for at that time, or soon after, by an order drawn by defendant in favor of the plaintiff, for 1426 feet of spruce clapboards, on William Wyman, jr., and that the original agreement of the plaintiff was to take his pay for said harness in boards, and that he accepted the said order therefor.

The only evidence in the case was the testimony of Ebenezer L. Way, a son of the plaintiff, who testified that in October, 1831, the defendant wanted to purchase of plaintiff a double harness, and pay in lumber;—that the witness was directed by his father to do as he thought proper;—that he, the witness, sold the harness to the defendant for the sum of ten dollars, and told him that he would take lumber in pay;—that the defendant wanted the witness to take an order on William Wyman, jr. in payment, which he refused to do;—that defendant was going to the west, and said he would pay for the harness when he came back, if Wyman did not pay the same;—that defendant left an order with witness on Wyman for 1426 feet of clapboards, and requested that the order

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should not be presented to Wyman until after June, when a second payment fell due from Wyman to defendant, and if Wyman did not pay it he would pay for the harness when he came back. The witness further testified, that he presented the order to Wyman, who said he should not pay it, and the first time that the defendant came back, he informed him that Wyman would not pay it.—The witness presented the order in court.

It was also in evidence that Wyman left the state last spring for Ohio. No other evidence was introduced on either side. On this evidence, the court found that the harness was sold to the defendant for the sum of ten dollars, and that the order was not received in payment, but received for the accommodation of the defendant—that the plaintiff might receive the clapboards if Wyman paid for them, and that defendant promised to pay for the same.—Whereupon, they rendered judgment for the plaintiff, to which the defendant excepts, and the cause passed to the supreme court.

Swift for the defendant.—I. It is claimed and contended on the part of the defendant, that the plaintiff's suit ought to have been abated on the ground of the variance between the writ and declaration below, and the declaration filed before the county court, and that the court ought not to have rejected the plea, for the reason that it was not filed within the time prescribed by the rules of the county court for filing dilatory pleas. Because,

1st. Such plea is not properly a dilatory plea; and it is considered and believed, that agreeably to the policy of our laws, and the course of judicial proceedings established in this state, such exceptions may at any time, or in any stage of the proceedings, be taken advantage of, even after judgment, and upon writ of error.—Chit. Pl. vol. 1, pp. 438–9, 450. Sw. Dig. vol. 1, p. 606, &c. 3 Bl. Com. 307.

2d. The time fixed by said rules for filing dilatory pleas, is the same for filing new declarations in appealed cases.—See rules 2d and 3d.

3d. The variance in this case is every way material, more especially as the plaintiff's counsel refused to give any specification, or bill of particulars under the general counts in his declaration, although regularly required so to do by defendant's counsel; and the defendant therefore could not know what the plaintiff relied upon to recover, or be prepared for trial, under the declaration; and he had a right, and actually did, in consequence, dismiss his witnesses attending.—Esp. N. P. 249, &c.

II. The testimony adduced in this case, will not sustain a recovery under either of the counts in plaintiff's declaration, showing merely a contract for a double harness, which the defendant contends is not included under the head of either *goods, wares or merchandize*, within the proper technical and legal import and signification of those terms, and the strict limited sense in which the word "*goods*" is there used—(the count for which is the only one, under which it could with any propriety or pretence be embraced.)—Chit. Pl. vol. 2, p. 16, &c. Esp. N. P. 270. Stat. 149. Besides,

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III. The contract, as proved, was a special one, and required a special declaration; and besides, the harness was to be paid for in specific collateral property, and not in money, and could not therefore be recovered for under any general counts.—Chit. Pl. vol. 1, p. 326, 333–4, 337, 338–9, 340, 343. Sw. Dig. vol. 1. p. 574, 684–5, 690, 695–6, 701, 704. Esp. N. P. 249, 262, 266. 4 East. Rep. 147.

IV. The testimony goes to show, that the plaintiff, or his pretended agent, received an order on Wyman for a quantity of boards, sufficient to answer the contract, although the witness testified that it was not received in payment for the harness; but notwithstanding, it is very evident that it was in some way or on some terms received in payment, and so understood between the parties at the time, from its being drawn for the precise amount, &c.; and we think that extraordinary weight and reliance ought not to be placed upon the testimony of witness, although he stated that he acted merely as agent for his father. But he was the person who solely made the contract with the defendant, (whose statement in relation thereto, differs very materially and essentially from that of witness,) and who is in every way, except by legal implication, as much interested to sustain his statements, as the defendant, and more so than the plaintiff himself; and receiving his testimony without allowance, is giving to the plaintiff a great advantage, as the defendant is not permitted to substantiate *his* statements by his own oath. And as it was proved that Wyman was fully responsible at the time when the order was drawn and presented, and had failed whilst it rested in the hands of the plaintiff, and more especially as it was proved that in the mean time, the plaintiff had received of Wyman, boards of like description as specified in the order, (and as Wyman claims to the amount of the order, which he states, that by agreement he had both accepted and paid,) the loss, if any, ought to fall on the plaintiff, (whose has been the *laches*.)

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and the defendant ought not now to be made responsible. It makes no difference in a legal point of view, as suggested by plaintiff's counsel, that the order was not drawn "for value received," &c.—Sw. Dig. 420. Esp. N. P. 134—do. 66.

V. It is also contended on the part of the defendant, that as it was proved that the order passed into the hands of the plaintiff, the implication of the law is against him, and he ought not to have been permitted to have shown, *by parol testimony*, any thing variant or contradictory from the expression upon the face of it; and that by so receiving said order, the plaintiff *at least* undertook a trust for the defendant, which he, the plaintiff, ought to have executed at his own responsibility; especially as the defendant was removed to a great distance. But,

VI. By the terms of the contract, as shown in evidence, the harness was to have been paid for in lumber; and as there was no time specified for the payment, nor the kind of lumber agreed upon, except as expressed in the order, a particular request and demand of the particular lumber by the plaintiff, and a refusal or neglect *beyond a reasonable time thereafter* of payment by the defendant, was necessary to be shown, to entitle the plaintiff to a suit and recovery therefor; and as in the present case no such request or demand has been shown or pretended, and not even the notice of non-payment of the order by Wyman, prior to the suit, to authorize the plaintiff to sustain a recovery thereupon, would effectually amount to an authority to any one, at his pleasure, to convert a demand payable in specific collateral articles, into a cash demand, and to superadd moreover, to the other sacrifice, a bill of cost to be paid as a further forfeiture.—Sw. Dig. vol. 1, p. 697–8–9. Chit. Pl. vol. 1, p. 322, 324. Esp. N. P. 249, 250, 251. Big. Dig. 749, A. 5. 1 Sw. Sys. 404. 1 Selw. N. P. 172–3–6–7.

VII. Rules of law are and ought to be established upon the basis or principles of justice; and the above, and all other rules, ought so to be construed as to subserve that purpose, &c.

Sargent for the plaintiff.—The question in this case seems to be more a question of fact than law; that is, whether from the evidence, the court found the facts correctly.

It was claimed by defendant, that an order was received by plaintiff, as payment for the property sold; and on this fact, the issue seems to have been tried.

How could the court have found the fact of payment, when no testimony was introduced by defendant to establish it? And the

single witness inquired of, denies it. The testimony, as detailed in the case, presents it in no different light; but shows a refusal to receive the order as payment, but merely to apply the avails as payment in case the order was duly accepted and paid by Wyman.

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The defendant took it upon himself to direct when and how the order should be presented to Wyman, which the witness undertook to do, as the friend of, and for the accommodation of the defendant.—2 Vt. Rep. *Goodrich vs. Barney*.

The opinion of the court was delivered by

COLLAMER, J.—Much is said by the defendant's counsel in relation to a plea in abatement, which he says was put in at the county court, and being out of time by the rules of that court, was disregarded; the ground of which plea in abatement was a variance between the writ before the justice, and the declaration which was filed in the county court, to which the cause went by appeal. This part of the case does not appear by the exceptions, nor properly could it, as the construction and execution of the rules of practice must be exclusively within the power of the court which makes them; and a court of error can take no judicial cognizance thereof. It is further to be remarked, that the ground stated by the defendant's counsel as the foundation of his plea in abatement at the county court, was entirely untenable. In England, there is, strictly speaking, no cause before the court until a declaration is filed, and a variance between that and the previous process would be at least seasonable for a plea in *abatement*, which must be *first* insisted on, before continuance. On an appeal from a justice to the county court, there has been a declaration, an imparlance, a judgment, and it is too late for a plea in abatement. The filing a new declaration in the county court is mere matter *in amendment*, allowed by a standing rule for the purpose of putting the matter into legal and technical form, required to avoid error in that court, but not required before a justice of the peace. If the new declaration is variant, and presenting new matter, the defendant should object to its being received; but if rejected, the plaintiff would not be out of court, or subject to *abatement* of his suit. He might still proceed on the former declaration.—*Barber vs. Ripley et al.* 1 Aik. Rep. 80.

The defendant's counsel has indulged in much latitude of remark on the weight of the testimony and other matter not appearing in the bill of exceptions, and on the merits of the question of fact which was tried below; nor is this a solitary case where counsel

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take such a course. It should at all times be remembered, that as to all cases which come to this court, on exceptions, they are to be viewed as strictly matters *in error*, the statute having merely substituted the course of passing them on motion to this court in the place of a writ of error. Such cases cannot be treated as motions or petitions for new trials, nor calling for the exercise of judicial discretion, like the proceedings on the return of a *postea* in England. We cannot revise the questions of fact which were settled below, whether it was done by the jury or by the court, by the consent of parties; and this case must be treated, in this respect, like all others, and we must receive it as a fact found that the order was not received in *payment*, but taken by the witness as the agent of the defendant for his accommodation.

It is insisted that the plaintiff cannot recover on the count for goods sold and delivered, on the ground that a harness does not come within the words "goods, wares and merchandize."

At common law, *bona et catella* included all personal property; and in a declaration, copied from common law forms, money, goods and chattels will include all personal property; and in declarations, words cannot have one sense here, and another in England. Stress is laid on the sense in which the court has decided these words are used in a certain statute, fixing the *place* where certain actions are to be brought. In that case the court very properly decided the words had there a local meaning; as we should say, the word *stock*, in a contract among our farmers, had a different meaning than at Lloyd's, or the London Exchange.

It is next insisted, that as there was a special or express contract in relation to the mode of payment for this harness, the plaintiff cannot recover on the general counts in his declaration. There has formerly been much controversy and contradictory decision on this subject; but as the law is now understood, the general counts are more extensively used than formerly, both in England and this country. It was formerly considered, that wherever there was an express or special promise, all implied assumpsits were merged and superseded, and could never after be resorted to. Such is not now the doctrine. Whenever there are goods sold, work done, or money passed, whatever stipulations may have been made about the price, or mode, or time of payment, if the terms have transpired so that money has become due, the general count may be sustained. But if the contract be executory and subsisting, and the action be for the breach, for the recovery of damages, then the count must be special. This becomes of much practical importance here in rela-

tion to the action on book, which will lie where the general counts for work done or goods sold can be sustained. It is frequently objected that an article cannot be charged in book, and recovery be had therefor in book, because there is a particular contract in relation thereto. It is to be settled by the above rule. For instance, if A agrees to make B a plough, for which B perhaps advances part, and agrees to pay the balance in grain the next winter: If the plough is made and delivered, it is proper to charge it in book, and if the grain is not paid when due, A may sustain assumpsit, as for goods sold, or an action on book. But if the plough is not made, and B sues to recover *damages* for the breach of the contract, he must declare specially, and cannot recover in general assumpsit, or on book. It is on this principle, that a man holding a note for money, payable to himself, may, after the pay-day has expired, maintain a general count as for money. In this case, it appears the plaintiff "*sold the defendant the harness for ten dollars, and told him he would take lumber in pay.*" Most obviously by the above rule, this was proper cause for a count in general assumpsit, or on book, if the time of payment had passed; and this brings us to the main question in the case. Had the time of payment passed, was the *money* due?

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It is insisted that the lumber should first have been demanded by the plaintiff, before suit. This was not a contract for any specific quantity of lumber at any particular time or place or on demand. Indeed the defendant never undertook to pay lumber. It was a mere reservation of a privilege to the defendant as to the mode of payment, which he might avail himself of or not, as he pleased; but could not be compelled by the plaintiff. Transactions of this character, to a very great extent, exist in this community. Our traders and mechanics are extensively in the practice of dealing out property on credit and charging it on book under an agreement to receive produce in payment. Now in such case, it is well understood such debtor may, in its season, deliver on such debt any such produce as is usually received and marketed, to wit, pork, butter, cheese, grain, wool, &c., without the same having been designated or demanded by the creditor; and, by reciprocity, the creditor may, after reasonable time after the season for paying produce has passed, sue and collect his debt without designating or demanding produce. The debtor, by delay, has waived his privilege. In this case, the defendant, in a reasonable time, might have delivered to the plaintiff in payment, marketable lumber, without any demand or designation as to kind, by the plaintiff. But from October, 1831,

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But even if it were true that in this case the defendant was entitled to a demand in the first instance, it is now waived. He proceeded to make his own provision for paying the lumber by an order. Had that produced the pay, all would have been well; but it failed, and he made no other provision. Whenever a debtor proceeds to do a thing which he was only bound to do on notice or demand, he can never afterwards say he had not notice or demand. He waives the demand, or conclusively acknowledges it. The defendant, by making the provision by order for the payment of the lumber, acknowledges the same to have been designated and demanded. That failing to produce the pay, and he making no other provision, it is now too late to deny the demand.

Judgment affirmed.

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SAMUEL C. RAYMOND vs. HOSEA WILLIAMS & SON.

When a debtor procures a person to purchase a note against him, under a contract to pay a specified sum, and after the purchase, wholly denies the agreement, and refuses to pay the same, or carry the agreement into effect, he cannot set up this agreement in defence to an action brought by the purchaser, as endorsee of the payee of the note.

This was an action on a promissory note, made by the defendant, and endorsed by Charter & Webb to the plaintiff, and came up upon the following bill of exceptions:

This cause was tried before the jury upon the special count in the declaration.—Plea, general issue. The plaintiff waived the common count.

The plaintiff produced and read to the jury the note described in his declaration, endorsed by Charter & Webb to him. The execution of said note by the defendants was admitted.

Humphrey Richardson, jr. testified, that the names, Charter & Webb, written on the back of said note, was the hand-writing of Charter, one of said firm of Charter & Webb, to whom said note was payable.

Albert R. Raymond testified, that in the fall of 1829, the plaintiff (who then resided at Bennington, being at Manchester, where said Albert resided,) left the note with him, with directions to call on the defendants for a confession on said note, and soon after the

witness called on the defendants, computed the interest on the note, and requested them to give a judgment on it. The defendants replied, they would see the plaintiff, as they were going to Bennington, and would confess judgment on the note, or settle it in some other way.

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The defendants, to support the issue on their part, called Mosley Hall, who testified, that in the fall of 1829, at the request of defendants, he went to Bennington to see plaintiff in reference to the note;—that he stated to the plaintiff the defendants claimed he was requested by them to procure the said note of Charter & Webb, under an agreement that he was to have the money advanced with interest, and a reasonable sum for his trouble;—and that the plaintiff denied this, and replied he was to have fifty cents on the dollar for all notes taken up for the defendants in New-York; and that it was so understood and agreed between himself and the defendants, before he took said note of Charter & Webb; and that said note of Charter & Webb was purchased under an express agreement that he was to have fifty cents on the dollar. Hall further testified, that in the fall of 1830, he was present at a conversation between the plaintiff and the said Hosea;—the said Hosea claimed and stated to said plaintiff, that said note was taken up for his benefit, and under an agreement that the said plaintiff was to be repaid the money advanced and interest, with a reasonable sum for his trouble;—that the plaintiff said it was not so, and replied he was to have fifty cents on the dollar;—that said Hosea offered to pay the plaintiff the amount advanced by him for the note and interest, and a reasonable compensation for his trouble; and to this the plaintiff replied, he should not give up said note unless the said Hosea paid fifty cents on the dollar. The witness further testified, that the defendant, H. Williams, had told him, that he requested Judge Hodges to buy the note for him. I did not know, when Hodges went to New-York, that Raymond had purchased the note.

Plyn A. Williams testified, that in 1831, he stated to the plaintiff, the defendants claimed he was to recover for getting said note of Charter & Webb the money by him advanced, with interest, and pay for his trouble; and that the plaintiff replied, it was agreed between the plaintiff and the said Hosea, previous to the time when he took up said note, he was to have fifty cents on the dollar for all notes purchased by him for the defendants in New-York; and that he was entitled to that amount on the Charter & Webb note. And further, that the said Hosea Williams failed in the fall of 1825,

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and that his father has denied the agreement to pay fifty cents on the dollar, and has refused to pay the same. Further, that Charter & Webb failed in the fall of 1825 ;—that in the following winter, Webb left New-York ; and that in February, 1826, the witness received a letter from Webb, stating he and the said Charter had dissolved their connexion in business.

Norris Dodge testified, that he was acquainted with the firm of Charter & Webb—had transacted business with them. Charter & Webb both are relatives of the witness. The said Charter & Webb failed in the fall of 1825, and have not been in business since ; and said Charter inquired of witness as to the probability of defendants' paying said note ; and the witness informed him, the defendants had failed ; and the said Charter replied, he knew it, and did not consider said note of much value.

Henry Hodges testified, that he was acquainted with the firm of Charter & Webb, while in business—was in New-York in the spring of 1826, and said Charter & Webb were not then doing business ; and that he saw Charter there at the counting-room of Charter & Webb ;—that in January, 1826, received a letter from Charter & Webb, proposing to take fifty cents on the dollar on the note, if it would be done soon.

Whereupon, the court decided, that as none of the facts testified to were denied by either party, on this testimony the plaintiff was entitled by law to a verdict, and they should so charge the jury ;—that there was no evidence tending to prove that the plaintiff purchased the note on the consideration that the defendants were to pay him a reasonable compensation for his trouble, and what he paid ; as the only evidence to this effect was the declaration of the defendants, which was denied by the plaintiff ;—that if the jury should believe, from the testimony, that the plaintiff agreed to purchase the note for the defendants, and was to have fifty cents on the dollar, yet as the defendants had refused to comply with that agreement and pay the fifty cents, denying that there was such an agreement, and claiming a different one, the plaintiff, as endorsee, was entitled to recover the amount of the note and interest.

The court further decided, that there was no evidence of the dissolution of the partnership between Charter & Webb, before the note was endorsed to the plaintiff, by which the jury could infer that Charter had no right to endorse the note.

A verdict was taken for the plaintiff.

Exceptions taken by defendants.

Mr. Bennet, for defendants.—I. The evidence shows that Raymond bought the note in question under an express agreement, previously made with the defendants, that they should pay him one moiety of the same, or fifty cents on the dollar.

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II. The court charged the jury, that though they should find this agreement proved, yet the plaintiff could maintain an action as *endorsee* of the note; and inasmuch as defendants had denied this agreement, and claimed a different one to have been made, the plaintiff was entitled to recover of the defendants the full amount of the note, and interest.

This charge, we think, ought not to be sustained, for the following reasons:

1. A note once discharged and paid, is *functus officio*, and cannot, after that, be negotiated.—3 Mass. R. 557, *Blake vs. Sewell*. 5 Mass. R. 512, *Baker vs. Wheaton*. 8 Mass. R. 466, *Boylston vs. Green*.

2. Under this agreement, Raymond was purchasing this note for the benefit of the defendants, at least for one moiety of the note, and as their agent.

3. The agreement, as disclosed by Raymond, was a valid one in the law, and had the action been predicated on it, it would have given a just verdict of damages.

4. It is difficult for me to perceive how the defendants' denying the *special agreement* claimed by the plaintiff, and insisting upon a different one, and declining to pay according to the special agreement, as insisted upon by the plaintiff, can have a *retroactive operation*, and resuscitate paper that was before that *functus officio*, and give effect to an endorsement which before that time was a nullity.

5. If Raymond and Williams did not think alike as to the terms of the *special agreement*, (both claiming one to have been made,) Raymond should have brought his action so as to have tried the right of the parties under the special agreement.

6. Raymond is guilty of *fraud* in procuring the note to be endorsed by Charter & Webb, and thus attempting to enforce the collection of the whole note of the defendants.

Though Williams & Son may have received of Charter & Webb the full consideration of the note, yet this is no reason why Raymond should receive a compensation to twice the amount of his agreement, and in direct contravention of the same.

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It seems from the case, that Williams & Son failed in the fall of 1825, and that Charter & Webb considered the note of little value.

7. The charge of the court violates the rule of damages as claimed by the *special agreement*, does injustice to my client, and introduces the cheering doctrine of giving two for one; whereby the plaintiff obtains twice as much as he pretends to have a right to claim.

III. The court also decided that there was no evidence of the dissolution of the partnership of Charter & Webb, before the endorsement of the note to the plaintiff.

1. There was evidence to show that Charter & Webb failed in the fall of 1825, and have not been in business since that time;—that in the winter following, Webb left New-York; and in February, 1826, wrote to one of the witnesses, stating among other things, that he and Charter had dissolved, &c.

The failure of a firm, and a consequent discontinuance of business, is *ipso facto* a dissolution.—3 Kent's Com. 27, last ed.

The acts and declarations of Charter & Webb, or either of them, while the note was in their hands, and before it was endorsed, are evidence against the endorsee.

The plaintiff offered no evidence to show at what time the note was endorsed, and it was incumbent upon him to show that it was previous to the dissolution.

Again, it seems that in January, 1826, Charter & Webb had the note in their possession, and were then proposing to negotiate a sale; and this was subsequent to the failure of Charter & Webb.

Mr. Isham for plaintiff.—The charge of the court was correct, “that there was no evidence tending to prove that the plaintiff purchased this note, on the consideration that the defendants were to pay a reasonable compensation for his trouble and what he paid.” Neither was there any evidence tending to prove a contract, that the plaintiff was to receive fifty cents on the dollar: In each case, there was the declarations of one of the parties; but in every instance, they were denied by the other.

The facts disclosed by the testimony of A. R. Raymond, are inconsistent with such an arrangement;—that in the fall of 1829, this note was presented to the defendants, interest computed, and a promise on their part “to give a judgment on the note, or settle it in some other way.” This is a recognition of the right of the plaintiff, as endorsee, to recover the amount of the note.

If there was such an agreement that he was to receive 50 cents

on the dollar, the defendants are estopped to claim the benefit of it, as they have refused to comply with it, denying its existence, and claiming a different one.—2 Maul and Selwin, 120, *Cranley vs. Hillary*.

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Such an agreement to purchase and compound with the defendants, is without consideration and void.—2 H. Blac. 317, *Lynn vs. Bruce*. 3 Vt. R. 334, *Seele vs. Spencer*.

There was no evidence to show that this note was endorsed to the plaintiff after the dissolution of the firm of Charter & Webb, or to show any of those facts necessary to constitute such defence, to wit, dissolution of the firm; notice of such dissolution, personally to the former correspondents, and publication to those who were not their correspondents, and the endorsement subsequent to such dissolution and notice.—1 Wheat. Sel. 230. 3 Day Rep. 353, *Mowall vs. Howland*. 1 Esp. N. P. C. 371, *Godfrey vs. Trumbull*.

In Wheat. Sel. p. 266, it is said that if a bill is drawn payable to A and B, who are not partners, if the bill be endorsed by A, in the name of himself and B, and this bill be afterwards accepted by the drawee, it is not competent for him to object to the regularity of this endorsement. So in this case; the promise, as testified to by Raymond, would amount to an acceptance of a bill; and being made after the endorsement, will equally preclude the defendants from objecting to the regularity of this endorsement.—1 Camp. Rep. 83, *Jones et al vs. Radford*, (note.)—*Ib.* 82, *Porthouse vs. Parker et al.*—*Ib.* 485, *Cotes vs. Davis*.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The endorsement of the note in this case, was undoubtedly *prima facie* evidence of the title of the plaintiff. There was no evidence that the firm of Charter & Webb was actually dissolved. They may have stopped business so far as it respects selling goods, and the partnership have continued as to all the debts due to, or from the firm. It appears that after they had stopped their mercantile business, they kept a counting-room in New-York, and wrote a letter to one of their correspondents in the country, in relation to this claim against these defendants. The question then is, was the note paid prior to the endorsement, or had it ever been, in fact, paid by the defendants, who received the consideration, and executed the note? There is no evidence, nor is there any claim on the part of the defendants, that they ever have parted with any property, or in point of fact, paid any sum whatever on the note. They only claim, that if the plaintiff purchased

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the note as their agent, that it was thereby paid. The correctness of this position is very questionable. We should pause, before we should determine, that a debtor may procure an agent to buy in his debts at a discount, without furnishing him any means therefor, and then contend that such purchase is a payment. The idea of a purchase is wholly at variance with a claim of payment; and it appears by the case, that the defendants never contended for any thing except that the plaintiff was to purchase the note as their agent.

In the case under consideration however, it appears that there was no evidence of any agreement for the purchase. The only testimony in the case, was the declaration of the parties. What was stated by the defendants, was wholly denied by the plaintiff; and the statement of the plaintiff was as strenuously denied by the defendants. The agreement contended for by the defendants, in the presence of the witness, Mr. Hall, was denied by the plaintiff, and there was no other evidence offered of any such agreement.—The statement of a party, in the presence of another, not acceded to by him but denied, cannot be considered as any evidence of the facts stated. The defendants can claim nothing from the agreement stated by the plaintiff, when at the same time the statement was made, he denied it so positively. There was therefore no evidence in this case, which would have warranted or justified a jury in finding a verdict for the defendants. In another view of this case, it appears that the defendants were without defence. If the agreement had been proved to have been as claimed by the plaintiff, in the presence of the witness, to wit, that he had purchased this note, on request of the defendants, under an agreement that he was to be paid fifty cents on the dollar, and waiving any inquiry whether such an agreement would have been considered as made upon a valid consideration, yet it is very clear that the defendants, to have availed themselves of any benefit from such an agreement, must have complied with the terms of it. Such was the decision of the court in the case of *Cranby vs. Hillary*, 2 Maul & Sel. 120, and such was the opinion of Lord Elenborough in *Boothley et al. vs. Sowder*, 3 Camp. 174. In the case under consideration, it appears that the defendants have not only expressly refused to perform any such agreement as was stated by the plaintiff, but have expressly repudiated it, and denied that any such one was made. With what propriety can they claim now any benefit of any such agreement, if there ever was one made? The defendants in every point of view were wholly without defence, and the county court

were right in deciding that there was no evidence tending to prove that the plaintiff purchased the note on the consideration stated by the defendants, and that the defendants could claim no benefit of the agreement, if any was made, that the plaintiff was to purchase the note, and have fifty cents on the dollar, as the defendants had not only at all times denied any such agreement, but had also refused to comply with the same. The plaintiff was entitled to recover the amount of his note and the interest, and the jury were rightly instructed.

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The judgment of the county court is therefore affirmed.

JABEZ HAWLEY vs. JAMES A. HODGE.

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Where a party revoked the powers of an arbitrator, by parol, and the arbitrators in consequence of the revocation, declined proceeding, he is not permitted to say, that the revocation was not made.

Where a person, who has submitted to an arbitrator, revokes, he must pay all damages, which the other party has sustained, and to which he would not have been subjected, but for the submission.

This is an action of assumpsit upon an arbitration submission.

The plaintiff and defendant had submitted all matters in controversy to Myron Clark, Esq., and that defendant had revoked the same. The submission was in writing—the revocation was by parol.

On trial, it appeared that at the time of the submission, an action was pending between the plaintiff and defendant, in which the plaintiff's costs then amounted to *two dollars and sixty cents*.

The defendant contended, that at the time of the revocation, mentioned upon the back of said submission, the plaintiff's costs in the arbitration, taking the rule of taxation in a justice's court, would amount to *four dollars and twelve cents*.

After the commencement of the present action, and more than twenty-four hours before the time set in the writ for trial before the justice, the defendant tendered and the plaintiff received the amount of five dollars and ten cents, as set forth in the defendant's plea in bar.

It further appeared in evidence, that at the time of the submission, the plaintiff had recovered a judgment against the defendant for the sum of ten dollars and forty cents damages, and two dollars and sixty cents costs, from which an appeal had been taken ;—that

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at the first time the arbitrator attended, Hawley was not present ; but Asa Baldwin, his agent, attended, and employed counsel to attend for him, to whom he paid two dollars ;—that at the time to which the arbitration was adjourned, the plaintiff came from the state of New-York, a distance of over four hundred miles, to attend the arbitration ; and that Mr. Baldwin, a witness, attended at both times when the arbitrator attended, living a distance of within one mile from the place where it was held ; and that the day after the arbitration, the plaintiff paid the arbitrator his fees, amounting to three dollars ;—and further, that the arbitration was adjourned for the purpose of procuring the attendance of Hawley, the plaintiff.

Whereupon, the defendant insisted, that inasmuch as no power was given to the arbitrator, by the submission, to tax or allow costs, the plaintiff could not recover.

The defendant also insisted, that in case costs were taxable under said submission, his tender covered all that were taxable.

But the court decided that the plaintiff was entitled to recover sufficient to compensate him for his trouble and expenses, which the said court allow, and find for the plaintiff to recover the sum of twenty-five dollars. To this decision, the defendant took his exception. Exceptions allowed and certified.

Mr. Sargeant, for defendant.—1. The submission was not so revoked as to prevent the arbitrator from proceeding.

2. Granting a legal revocation, it gives the plaintiff no right of action, inasmuch as no power was given by the submission over the subject of costs.

3. If costs were taxable, the tender and receipt by the plaintiff was sufficient to bar the action.

1st. The case shows a written submission ; and the act of the defendant, alleged to be a revocation, was by parol.

The principle that every contract shall be cancelled by some act of as high a character, has been applied to cases of submission and revocation.—Caldwell on Arbitrations, 36. Sw. Dig. 465.

2d. It is insisted that where no power is given by the submission over costs, none can be taxed by the arbitrator. This principle necessarily arises out of the doctrine, that an arbitrator has no authority over the matter submitted, beyond what the parties have voluntarily conferred upon him by the submission.—Caldwell on Arbitrations, 16.

It is said, (Cald. on Arb. 76) “ *It is not quite so easy to deter-*

mine from the cases, how far an arbitrator has power over costs, where the subject is not noticed in the submission."

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It is believed the great difficulty is obviated, when we notice the author is commenting upon submissions under rules of courts, and not on arbitrations under the common law; for we find a discrimination frequently made between the costs under the submission and the costs of the action; and these questions are generally raised on the application to the court to enforce the award.

This doctrine, reasonable in itself, and the only one which can rationally grow out of the fair import of the submission, is laid down as a well settled principle of common law, based on English authority, in the case of *Peters vs. Pierce*, 8 Mass. Rep. 398-9. Also, 10 Mass. Rep. 442.

This doctrine established, it follows manifestly that the plaintiff had no cause of complaint; he was in no wise damnified by the act of the defendant.

If it amount to a revocation, it most certainly inured to the plaintiff's benefit, by throwing his case where he could pursue it in a court of law, and in case of success, recover costs.

3d. If the plaintiff were entitled to costs, he certainly could be entitled to no more than could be taxable, treating the case as before the only court in the government which would have jurisdiction over it.

That amount appears to have been tendered by the defendant, and received by the plaintiff.

The amount paid by the plaintiff to the arbitrator, was not paid by any request of the defendant.

It was not only a sum of money which the defendant was doubly under a moral obligation to pay the arbitrator, but the plaintiff has no right to take charge of the defendant's moral obligations, thereby to provide himself with weapons to attack the defendant.

Mr. Swift, for plaintiff.—1. The law is settled at the present day, that the power of arbitrators awarding costs is *incident* to the authority contained in the general submission of the matters in dispute.—2 Term Rep. 644, *Roe vs. Doe*. 14 John. Rep. 161, *Strong vs. Ferguson*. 1 Bin. Rep. 61, *McLaughlin vs. Scott*. Kyd on Awards, p. 134. Ca. Temp. Hardwick, *Shepherd vs. Brand*.

2. If a party revokes his submission, it is a violation of his agreement to submit, and he is bound to make good his damages; and the rule of damages is the *cost and expenses* to which the oth-

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February, submission, and which he has lost the benefit of by the revocation.
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The opinion of the court was delivered by

WILLIAMS, Ch. J.—Several questions have been made in the argument, which do not arise from the case. The action was founded on a submission of certain controversies between the plaintiff and defendant to an arbitrator. The defendant revoked, and the county court found and assessed the damages, which the plaintiff had sustained thereby. The several questions, however, which were made, have been considered; and the result is, that we see nothing erroneous in the proceedings of the county court. It appears that the submission was in writing—the revocation was not in writing. It is not necessary for us to say whether the arbitrator would have been justified in proceeding with the arbitration, without a written revocation. The defendant made a parol revocation, and his power to do so was not questioned by the arbitrator, or the other party at the time. The arbitrator declined proceeding, and entered on the submission, that the defendant, Hodge, had revoked the power of the arbitrator. The defendant cannot now dispute the revocation, or say that he should have revoked in a different manner. Again, as to the costs, no question could arise on the trial as to those, except on the plea of tender. There is however no question that it is incident to the authority given to an arbitrator in a general submission, where no mention is made of cost, to award concerning the cost of the arbitration. Here there was no award. The only way in which this question of cost can now be raised, is on the inquiry, whether the sum tendered by the defendant, and received by the plaintiff, was the full amount to which he was entitled. The county court have found the damages to be greater than the sum tendered; of course, the tender ceases to be of any consequence. As to the damages, the rule is, that where a party revokes, he must pay all damages which the other party has sustained. This would of course include the cost of the suit discontinued, the cost and expenses which the party had been subjected to in preparing for trial, which he would not have incurred, or been subjected to, but for the submission, and which he cannot recover in any other way. These have been found by the county court, and exceed the sum tendered.

The judgment of the county court is affirmed.

EXECUTORS OF JOSEPH BURR vs. RICHARD SMITH *et al.*

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(*In Chancery.*)

Courts of chancery had jurisdiction of bequests to charitable uses, before the statute of 43d Elizabeth, by virtue of their equity jurisdiction.

The law, as now established, in relation to gifts, &c. and to charitable uses, is not derived from that statute, but existed anterior.

A gift to a charitable use, may be decreed, notwithstanding the objects are vague and indefinite, and notwithstanding the persons who are to carry into effect the intent of the testator, are a society unincorporated;—thus a gift to the treasurer for the time being of the American Bible Society, &c., held to be good.

Quere.—Whether the 41st section of the constitution of this state does not render all societies for the advancement of religion and learning, and for other pious and charitable purposes, capable of receiving gifts, and holding property without incorporation.

This was a bill in chancery, exhibited by the executors of the will of Joseph Burr, late of Manchester, in the county of Bennington, and state of Vermont, who died leaving no issue, against Moses Allen, John Adams, Richard Smith, Knowles Taylor, Samuel Hickok, James D. Butler, treasurers of the several societies named in the bill, and Hannah Treadway, Daniel Kissam and Peggy C. Kissam, wife of said Daniel, James T. Burr, Peggy Burr, Mary Burr, Sarah Burr, residuary legatees of the will of Joseph Burr, deceased, setting forth the organization of several charitable associations, to wit: The American Bible Society, The American Colonization Society, The American Tract Society, The American Home Missionary Society, and The Vermont Domestic Missionary Society. The following extract shows the general form of the descriptions given to these different societies:

That Samuel Spring and Jedediah Morse, of the Commonwealth of Massachusetts, Lyman Beecher and Nathaniel W. Taylor, of the State of Connecticut, John Meacham, Philip Milldoler, Gardner Spring, Orrin Day, and Eliphalet Nott, of the State of New York, Joshua M. Wallace and Thomas I. Briggs, of the State of New Jersey, and John H. Rice, of the State of Virginia, and divers other persons residing in different parts of the United States, many of whose names are unknown to your orators, being convened in the city of New-York, in the county and state of New-York, on the eleventh day of May, in the year of our Lord one thousand eight hundred and sixteen, formed themselves into a voluntary association or society, by the name of The American Bible Society, for

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the purpose of encouraging and promoting a wider circulation of the Holy Scriptures, without note or comment throughout the United States and their territories, and also in other countries, whether Christian, Mahometan or Pagan, framed and adopted a constitution, setting forth the object of said society or association, the terms on which members might be admitted into said society, and the means or organs of conducting its operations, and therein providing also that the officers of said society should be a President, Vice President, Treasurer, Secretaries, and a Board of Managers ;—that the said society, at the same time, organized by electing divers persons to fill the said offices of President, Vice President, Treasurer, Secretaries and Managers thereof, and hath every year since that time to the present, at annual meetings of said society, continued to fill, and hath kept full the said offices, for the purpose of conducting the business and promoting the aforesaid objects of the said society or association, by appointing divers persons to fill said offices ;—that at the time of the formation of said society and since, many thousand persons, residing in different parts of the United States and their territories, have united themselves with, and become members of said society, and have paid thereto several hundred thousand dollars to be expended in prosecuting the aforesaid objects of said society, and that ever since the aforesaid formation of the said society, the existence thereof under the name aforesaid, the objects and operations thereof, and the existence of the aforesaid officers thereof, have been, as your orators verily believe, extensively and generally known throughout the United States.

The bill then sets forth as follows :

And your orators further show unto your honors, that Joseph Burr, of Manchester, in the county of Bennington, and state of Vermont, at said Manchester, on the fourth day of April, A. D. 1828, the said Joseph then well knowing and understanding the existence of each and every of the aforesaid associations and societies, and the objects and purposes of each and every of them, and that each and every of said societies for the promotion and execution of the purposes and business thereof, had such officers as hath herein before been set forth, made, executed and published his last will and testament, in which said will, the said Joseph did, among other things, bequeath as follows, to wit :

“ I give and bequeath to the Treasurer, for the time being, of the American Bible Society, formed in New-York, in the year 1816, for the use and purposes of the said society, eighty-four shares of

stock in the Union Bank in the city of New-York, belonging to me, valued at four thousand two hundred dollars—also eighty shares of stock in the City Bank, in the city of New-York, belonging to me, valued at four thousand dollars—also ten shares of stock in the Bank of America, in the city of New-York, belonging to me, valued at one thousand dollars—also the sum of five thousand eight hundred dollars in cash, to be paid by my executors to the said Treasurer in five annual instalments, next after my decease, they taking receipts for the same.

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“I give and bequeath to the Treasurer, for the time being, of the American Home Missionary Society, formed in New-York in the year 1826, the sum of ten thousand dollars, for the use and purposes of said society, and I do hereby direct my executors to pay said sum of money to the treasurer of said society, in five annual instalments, next after my decease, taking receipts for the same.”

The bequest to the other societies were in similar form.

The bill further states—

And that said Joseph, after making in his said will, divers other bequests and devises of lands, tenements, goods and chattels, and sums of money, to divers other religious, charitable and literary institutions, societies and corporations, and to divers other individuals, did in and by his said will, give and bequeath the rest and residue of his estate to James T. Burr, Peggy Burr, Mary Burr, and Sarah Burr, of the city of New-York, Hannah Treadwell, and Peggy C. Kissam, wife of Daniel Kissam of North Hampstead, and George Burr of Lansingburgh, all in the state of New-York, by a clause in the said will contained, of the tenor following, to wit :

“As to the rest and residue of my estate, after the payment of all my just debts, and all legacies specified in this my last will, the expenses of settling my estate, and a reasonable compensation for my executors for a faithful discharge of the trust imposed on them, I give and bequeath the same to Hannah Treadwell and Peggy C. Kissam, children of my deceased sister, Susannah, James T. Burr, Peggy Burr, Mary Burr, and Sarah Burr, children of my brother Isaac Burr, and to George Burr, son of my brother Jonathan Burr, in equal proportions.”

The bill then sets forth the death of Mr. Burr, the exhibition, proof and allowance of the will by the court of probate, the appeal to the supreme court, taken by the residuary legatees, who were the heirs and representatives at law of the testator, their neglect to

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carry up said appeal, the entry thereof by the executors, and the affirmance by the supreme court of the decree of the court of probate.

In describing the treasurers of the several societies, the bill sets forth that John Adams, of the city, county and state of New-York, was elected and appointed sole treasurer of the aforesaid society, known by the name of "The American Bible Society," on the first day of November, A. D. one thousand eight hundred and twenty-seven, and did then and there take upon himself said office; and as your orators are informed and verily believe, ever since, hath ever since held and sustained the said office, and performed the duties thereof, and still doth hold and sustain said office and perform the duties thereof, and ever since hath been and still is generally known as the treasurer of said society.

And your orators further show unto your honors, that Richard Smith, of the city of Washington, in the District of Columbia, was, on the first day of January, A. D. one thousand eight hundred and twenty-eight, and before the making of said will, elected and appointed by the aforesaid society, known by the name of "The American Colonization Society," treasurer of said society, and did then and there take upon himself said office, and hath ever since and still doth, as your orators are informed and verily believe, held and sustained the same office by repeated elections thereto, and ever since hath performed, and still doth perform the duties thereof, and ever since hath been, and still is generally known as such treasurer.

A similar description is given of the treasurers of the other societies.

The bill then states the demands made upon the executors for the legacies by the treasurers of the different societies, and also by the residuary legatees, and a notice from them that they should claim all the sums of money bequeathed to the societies named in the will, the readiness of the executors to pay all the legatees when the rights of the respective claimants should be fairly adjusted by the decision of some court of competent jurisdiction, having power to protect them in the premises, their refusal to pay before said adjustment, their offer to pay the money into court, and their prayer that the parties may interplead so that their rights and claims may be adjusted among themselves, and the willingness of the executors to pay the money to such of them to whom it shall appear to belong.

The separate answers of the several treasurers of the societies were nearly the same in expression and substance, and admitted the facts set forth in the orators' bill, stating that they were, and still are treasurers of their respective societies, and as such, claim the legacies in the will to be decreed them for the uses and purposes of said societies, and denying the claims of the residuary legatees.

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The answer of the residuary legatees admits the facts stated in the bill, but denies the claims of the societies, and demands the money bequeathed said societies as belonging to themselves.

G. Wood for the special legatees.—The question to be determined is, whether the bequests in the will are or are not good and valid bequests to charitable uses.

Charities are distinguished into two kinds, viz: general charities, and charities with a fixed and definite purpose, having a scheme to administer the charity. In both cases the *cestui que* trusts or objects of the charitable bounty are generally uncertain, and are to be sought out and relieved.

In the latter, the character or class of objects to be relieved is designated, and the mode of relief prescribed. In the former, the mode of administering the relief, and the class of objects to be relieved, are to be established.

They are also divided into charities with a charter of incorporation to administer them, and charities at large.

In the former case, the founder is the visiter of the charity, or if he waives the right of visitation, or the charity is founded by the sovereign, the sovereign is the visitor.

In the case of general charities, they are established by the king, and in the case of charities founded by charter, where he is visitor, they are visited by him, not in *person*, but by delegation under the sign manual. Their powers, as well of establishment as of visitation, are *judicial*, and when delegated to the chancellor, he exercises a special, summary, delegated, judicial power, distinct from his general *equity* in common law jurisdiction, like the special delegated power exercised by him in establishing a case of idiocy or lunacy.

The king exercises, through his delegate, this summary and extraordinary judicial power, in virtue of his prerogative as *parens patriæ*, or protector of the people.

In addition to this, he will, as *parens patriæ*, enforce public rights, and rights partaking of a public character, as charities, in the different

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courts of justice, under their general jurisdiction. For that purpose, his attorney general will exhibit an information.

In the case of charities with a scheme and definite purpose, where it is necessary to make the attorney general a party, as where the trustee abuses his trust, or a new trustee is to be appointed, or where the managers of the charity violate their duties and are to be called to an account, the attorney general will exhibit an information in chancery for the purpose, which is conducted under the general equity jurisdiction of the chancellor.

When there are visitors of a charity founded by charter, if they are trustees of the charity and abuse their trust, they are called to account by bill or information, as the case may require, under the general equity jurisdiction of the chancellor.

Whether a charity is administered by one or more individuals, or by a corporation, or by a voluntary association, and either according to some settled plan, or with more or less latitude of discretion, *they* are not the *cestui que* trusts. They are, to use the language of chancellor Jones in 9 Cowan, 465, only the almoners to dispense the bounty.

The doctrine of charitable uses had its origin in the civil law. Hence it spread through the different countries of modern Europe.

In Domat's Civil Law, vol. 2, pp. 168, 169, 170, (book iv. § vii) are the following passages: "Legacies to pious uses are those legacies that are destined to some work of charity, whether they relate to spiritual or temporal concerns. Thus a legacy of ornaments for a church, a legacy for the maintenance of a clergyman to instruct poor children, and a legacy for their sustenance, are legacies to pious uses."

"We may make this a just difference between legacies to pious uses and the other sorts of legacies, that the name of legacies to pious uses is properly given only to those legacies which are destined to some work of piety and charity, and which have their motives independent of the consideration which the merit of the legatees might procure them; whereas the other legacies have their motives confined to the consideration of some particular person, or are destined to some other use than to a work of piety or charity."

"All legacies which have not for their motive the particular consideration of some person, are not for all that of the number of legacies to pious uses, although they be destined for a public good, if that good be any other than a work of piety or charity. Thus a legacy destined for some public ornament, such as the gate of a city, for the embellishment or conveniency of some public place,

and others of the like nature, or a legacy of a prize to be given to some person who should excel others in some art or science, would be legacies of another nature than those to pious uses."

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"If a pious legacy were destined to some use which could not have its effect, as if a testator had left a legacy for building a church for a parish, or an apartment in an hospital; and it happened either that before his death the said church or said apartment had been built out of some other fund, or that it was no ways necessary or useful, the legacy would not for all that remain without any use, but it would be laid out on other works of piety for that parish, or for that hospital, according to the directions that should be given in this matter by the persons to whom this function should belong."

"Since legacies for works of piety and charity have a double favor, both that of their motive for holy and pious uses, and that of their utility for the public good, they are considered as being privileged in the intention of the law."

We here see the elements of the law of charitable uses, as administered in the English court of chancery.

I propose to establish the following propositions:

1. That the doctrine of charitable uses was borrowed from the civil law, and incorporated into the law of England, long prior to the 39th or 43d of Elizabeth, and was recognized, though not enforced in the common law courts.

2. That these equitable rights, which are distinct from the legal estate, were, prior to the said statutes, enforced and protected by the chancellor, under his *general equity jurisdiction*.

It would be singular, if it were otherwise. Practical charity is an essential part of Christianity. Charitable institutions, more or less permanent, as the case may require, are constantly springing up in every Christian country. The practical exercise of charity as a constant spring of action, distinguishes the Christian world from the Pagan. The protection and enforcement of its rights and its duties by law, distinguishes Christian governments from Pagan governments.

These charitable institutions are in their nature vague and indefinite. The objects of charitable bounty, on an extended scale, are to be sought out, and cannot be certain like ordinary *cestui que trusts*.

A vast mass of property will and must, in every Christian community, exist in this form. The question is, should it be protected by law or placed beyond the pale of the law?

If the almoners of the charity are incorporated, this does not

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February, charity and the due administration of it; otherwise the members of
 1836. a corporation might with impunity misappropriate it, or even divide
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This doctrine was introduced into England from the civil law. *White vs. White*, 1 Bro. Chan. Cas. 12, 15. 2 Kent's Com. sec. 33. 3 Peters. 481-2. The testament to pious uses is not void in respect of uncertainty as other testaments are.—Godolphin, part 1, chap. 5, sec. 4, p. 17. If a testator give the residue of his goods to the poor, this disposition is not void by reason of uncertainty, for that is a testament, *ad pias causas*.—Swinb. part 7, § 8, p. 909.

In Porter's case, (1 Co. K. 24) charitable uses are recognized as good and valid dispositions. See Sanders on Uses, 62.

(6 Co. K. 2) The lord purchases part of the land charged with services for the advancement of religion—the entire services remain, though it would be otherwise in other cases.

Gibbons vs. Martinoke, Popham, 6, 7, 8. *Martindale vs. Martin*, Cro. Eliz. 288. In 4 Reeve's Eng. Law, 551, it is stated to have been the duty of the ordinary to distribute a portion of the estate of the deceased to charitable uses. When thus distributed, the disposition must have been considered valid at law.

The statute of 43d Elizabeth could not have been otherwise than declaratory in enumerating charities, for it contains an enumeration of only thirteen, and justice Baldwin has collected a much larger number as declared by previous statutes and previous authorities, embracing all those enumerated in that statute.

Magil vs. Brown, in the circuit court for the district of Pennsylvania, on the will of Sarah Zane, pp. 54, 55.

In *Bendlowe's* case, cited in 4 Coke, 24, it was decided that a feoffment to the use of *poor people* was not within the act of 23 H. 8.

The object of these various statutes appears to have been to define charities, in order to distinguish what was good from what was superstitious, in order to prohibit the latter. Hence courts have never been confined to the cases enumerated, but they have protected analogous cases as good charitable uses.

In the *Attorney General vs. Combe*, the statute of 43 Eliz. took pattern from 1 Eliz. 6, made to take away superstition. Hence when any difficulty has since arisen about charitable dispositions, the inquiry has been, not whether they were embraced within the statute of Elizabeth, but whether they were analogous in principle.

The vast mass of charity cases enforced since the statute of 43d Elizabeth never could have been satisfied upon any other construction of that statute.

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The act authorizes the commissioners to inquire after and redress *abuses* and *frauds*, &c. How could there be *abuses and frauds* upon property dedicated to charitable uses, if they were not recognized by the laws of the land?

2. These charitable uses were protected by the chancellor, prior to the statute of 43d Elizabeth, under his general equity jurisdiction.

Doubts have been cast upon this subject by the dicta of Lord Loughborough, in 3d Vesey, 726, and of chief justice Marshall in the case of the *Baptist Association vs. Hirt's Executors*, in 4 Wheaton's Reports.

Lord Loughborough remarks, that prior to the time of Lord Elismire they made out their case as well as they could at law, and he refers to 1 Co. 16, and 10 Co. 1, to show that the doctrine of charitable uses was recognized in the common law courts. Of course then he was of opinion that charitable uses were valid at *law*, if not in *equity*, prior to the statute of 43d Elizabeth.

His opinion that there was no remedy in equity seems to be adopted by the chief justice in 4 Wheaton, 42; and they both refer to *Porter's* case in confirmation of this opinion.

But there was no remedy whatever at *law* for breach of a charitable use.—Cro. Eliz. 288. In Peters' case the performance of the charitable act was a *condition* and not a *use*, which condition the heir alone could take advantage of, and therefore the proceeding was and could only be at law. A similar effort to recover at law was made in Cro. Eliz. 288, which failed because it was determined to be a use, and not a condition, and therefore not cognizable at law, though the judges expressly decided that such uses were good. The remedy, therefore, for a breach of a charitable use must have been somewhere else.

The chief justice remarks, 4 Wheaton, 35, that in *Porter's* case no question arose concerning the possibility of enforcing the execution of the trust—that it was not forbidden by law, and therefore the trustee might execute it. This is all true of a *condition*, but not of a *trust*. A trust must be *sanctioned* by law as a *trust* to warrant its execution, otherwise the trust fails, as in *Morrice vs. The Bishop of Durham*, 9 Vesey, 319. Therefore the inference from *Porter's* case, that these trusts were too vague to be assisted in equity, without the aid of the statute, is not warranted.

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The chief justice, 4 Wheat. 38, remarks, that we have no trace in any book of an attempt in the court of chancery at any time anterior to the statute to enforce one of these vague bequests to charitable uses.

These bequests are vague, as above shown, from the reason and nature of the thing.

The readings of Sir Francis Moore upon the statute of charitable uses appear to have escaped the attention of the court, as well as of Lord Loughborough. He was the framer of the statute, had read and written extensively on the subject, and may be presumed to know whether the chancellor, under his general equity jurisdiction, did give relief before.

Payne's case in *Bridgman's Duke*, 156, and *Fleming's* case, ib. 163, cited from Moore's readings, establish such previous jurisdiction beyond the possibility of doubt.

See also *Pember vs. Knighter*, and *Pensted vs. Reyer*, Duke. 381, to the same point, also *Hynshaw et al. vs. Morpeth*, Corporation, ib. 242.

The chief justice further remarks, 4 Wheat. 36, if charitable trusts, *however vague*, could *then*, (that is, before the statute,) as *now*, have been enforced in chancery, why pass an act to enable the chancellor to appoint commissioners, &c.? If the chancellor could accomplish this, to what purpose pass an act? The reason may be found in the above case of *Morpeth*, Duke, 242.

The chancellor in that case decided that the commissioners had jurisdiction in that case, otherwise the trustees would go unpunished, unless in chancery, or parliament, which would be a tedious and chargeable suit for poor persons.

The object of the act was, to introduce a new and summary remedy, to avoid the expense and delay of a chancery suit, with an appeal to parliament. Hence it appears that the chancery suit did not grow out of the statute, but the remedy in the statute, was intended to avoid the necessity of resorting to it.

In the *Attorney General vs. Matthews* 2 Lev. 167, it appears that *general* charities, not confined to a *definite purpose*, are not within the statute. The most vague of all charitable bequests are enforced independently of the statute, unquestionably, and cannot be said to have been introduced by it.

A class of cases occurring after the statute of Elizabeth is referred to by the chief justice to support his views upon this subject, viz: *Finch*, 221, *Cas. in Chan.* 134, 237, 1 *Hob.* 136.

These cases prove, that under a liberal construction of appoint-

ments to charitable uses, the statute cured all defective conveyances, and conveyances to corporations were made valid, and the statutes of Mortmain were thereby respected, *pro tanto*. In these respects the statute was not merely declaratory, and being cases arising within the statute, another question arose, whether the relief in those cases was not confined to the summary remedy given by the statute, but it was determined that the chancery might, by *original bill*, relieve in those cases, exclusively within the statute. No fair inference could be drawn from thence, that the statute gave the remedy by original bill, in all other cases in respect to which the statute, so far as it embraced them at all, was merely declaratory.

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It is evident that, anterior to the statute of charitable uses, a vast mass of the property of the kingdom had been dedicated to such uses and existed in that form. It could not, as before shown, be protected in courts of law. Chancery was the proper forum to give relief, and did give relief in the case of ordinary uses and trusts. It is a well settled principle, that there is no right without a remedy, if no where else, at least in the appropriate court of general jurisdiction. Chancery was the appropriate court of general jurisdiction.

Lord Macclesfield, in 2 P. Wms. 119, states, that the king has, *pro bono publico*, and independent of the statute, an original right to superintend the care of charities, and before it as well as since, it is every day's practice to file informations *in chancery* in the attorney general's name, for the establishment of charities.

Upon this the chief justice remarks, 4 Wheat. 39, that this is no more than that right of visitation, which is an acknowledged branch of the prerogative, and is certainly not given by statute. These words were offered for the purpose of illustrating the original power of the persons and estates of infants, and not with a view to any legal distinction between a legacy to charitable and other objects.

By this he means to say, that these *vague* trusts, as he calls them in another place, are void as well in the case of charities, as in other cases at *common law*, and not altogether on that statute.

The case above cited from 2 Lev. shows, that these vague or *general* charities are not *within the statute*, but rest on *general* principles and independently of the statute.

The power of the king, as *parens patriæ*, to superintend charities, is something more than his visitorial power, which is confined to corporations, and exists only when there is no other visitor.—*Phillips vs. Bury*, 1 Lord Raym. 5 s. c. 2 Ter. 346. *Dartmouth*

BENNINGTON, *College vs. Woodward*, 4 Wheat. 674. *Attorney General vs. Earl Clarendon*, 17 Vesey, 498.

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The distinction must be attended to between the judicial power of the king as *parens patriæ*, delegated usually to the chancellor, and his general superintending power, enforced through his attorney general, in courts according to their *general jurisdiction*, and in which the attorney general appears only as a suitor to enforce their rights upon general principles of law and settled rules of practice.

This special summary jurisdiction is exercised by the chancellor, as a delegation of the crown, in a summary way, in the case of general charities, visitations of elymosynary corporations, and of idiots and lunatics.

The proceedings are before the chancellor by petition or commission, under the sign manual, in a summary way. See *Attorney General vs. Herrick*, Amb. 712, and the cases there referred to. 2 Harrison's Ch. Pr. for proceedings on commission to establish a case of idiocy or lunacy.

In the *Attorney General vs. The Earl of Clarendon*, 17 Ves. 492, an information for the regulation of Harrow School, under the visitorial power, was dismissed, on the ground that the remedy was by petition to the crown, and not by bill or information. But in *Attorney General vs. Dixie*, 13 Vesey, 519, it was held that an information would lie in the case of an abuse or mismanagement of the revenues by the members of a charitable corporation, under the general jurisdiction of the court in cases of *breach of trust*, on p. 553, the chancellor states, that although a commission of charitable uses could not issue in such case, the court may act. See also *Dummer vs. The Corporation of Chippenham*, 14 Vesey, 252, 2 Mad. Ch. 129.

That the proceedings by information in chancery are under its general equity jurisdiction, and according to its settled rules of practice, see 2 Vesey Sen. 327, 328, Mitford's Pleadings, 78, 79.

In ———, 9 Vesey, 547, an application was made to tax costs in a summary proceeding before the chancellor exercising the power of visitor, on the ground of its being a proceeding *in equity*, and therefore within the statute allowing costs. It was refused, the proceeding not being *in equity*. But costs are constantly taxed in proceedings in charity cases, whether by *bill or information*.

It is usual to blend in the case of general charities the equity jurisdiction of the chancellor upon bill or information with his delegated summary jurisdiction by petition under the crown, as in *Ca-*

ry vs. *Abbott*, 7 Vesey, 490, 497, which was by bill, the attorney general being defendant. The same took place in *Attorney General vs. Dixie*, 13 Vesey, 535; also in the *Attorney General vs. Herrick*, Ambler, 713, and in *Attorney General vs. Lyderfin*, 1 Vern. 224.

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In such case the charity is defined and settled, as to its purposes, under the sign manual, and a final decree is had upon the bill or information directing the appropriation of the funds, or as the case may be.

These views of the subject will serve to explain the general remarks of treatise writers on the powers of the king as *parens patriæ*, and the powers of the chancellor as his delegate.

In 2 Vern. 342, the chancellor says, there were several things that belonged to the king as *parens patriæ*, and fell under the care and direction of this court as charities, infants, idiots and lunatics. But the chancellor certainly did not mean to say, that in all proceedings touching those interests before the chancellor, he is acting as the special delegate of the crown. He may be so acting on appointment of guardians to wards, and in protecting wards of the court in a summary way. But when bills or informations are exhibited touching any of those interests, the proceedings are under the equity jurisdiction of the court, and costs are taxed as proceedings in equity.

The sovereign, as *parens patriæ*, or guardian of the people in return for their allegiance, will take care of such of his subjects as are unable to take care of themselves, whether it proceed from non-age, idiocy, lunacy or the like.—Chit. Prerog. of the Crown, 158. Standf. Prerog. 37.

When the sovereign sues in courts of justice, he proceeds according to the laws of the land and the practice of the courts.

Thus an information of debt is in effect the king's action of debt.—Chit. Prerog. 335. 3 Bl. Com. 261. *Porter's case*, 1 Co. 24, was an information for intrusion, but it will not be pretended that the judges of the exchequer were then acting under a personal delegation from the crown.

When the United States sue in the federal courts, either on the common law or equity side, they are governed by the same general principles as in other cases.

In the *Attorney General vs. The Mayor of Dublin*, 1 Blingh's Rep. 347, 348, (new series,) Lord Redesdale says the king, as *parens patriæ*, has a right to call upon the courts of justice according to the nature of their *several jurisdictions*, to see that right is done to the subject.

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To conclude, upon this branch of the case: The power of giving relief by information is under the general equity jurisdiction of the court, and if this power did exist anterior to the statute of uses, it establishes the original jurisdiction of that court, as a court of equity, over the subject, independently of the statute. We have shown from Duke the power of the court, anterior to that statute, to give relief by original bill. The testimony of Lord Eldon to the high authority of that work will be found in 1 Swanston, 298-301.

Lord Eldon, after a full examination of the subject, says, that where there is a general indefinite purpose, not fixing itself upon any object, the disposition is in the king by sign manual, but when the execution of the charity is to be by a trustee with general, or some objects pointed out, the court will take the administration of the trust.—*Moggridge vs. Thackrule*, 7 Vesey, 86, 87.

The case of Bradley's will, 7 Vesey, 50, and of *Morrice vs. Bishop of Durham*, 9 Vesey, 319, were decided expressly on the ground that the trusts were too extensive to be embraced under the head of charities. Benevolence, virtue, and the happiness of mankind, may embrace charity, but they embrace something more.

The statute is referred to as a guide to ascertain what is *charitable*. Not one word is said in either of those cases to show that the remedy, whether by original bill, or information, is derived from the statute.—See his opinion also in 3 Mir. 409, and 6 Dow, 137.

In the *Attorney General vs. Mayor of Dublin*, the original jurisdiction of equity over charitable uses came up directly because that statute did not extend to Ireland. Lord Redesdale decided that chancery had original jurisdiction over charitable uses, which was affirmed on appeal in parliament, Lord Eldon presiding.—1 Bligh's Reports, (new series) 347.

But if we suppose that the equity jurisdiction over charities has arisen since the 43d Elizabeth, it manifestly has not sprung from the provisions of that statute. The power of the chancellor, under that statute, is special and summary, and altogether different from his general equity jurisdiction.—*Windsor vs. Furnham*, Cro. Car. 40. and 2 Atk. 551. From these cases it appears that neither an appeal nor a bill of review lie from the decree of the chancellor on commission, but an appeal will lie from his decree on original bill in a charity case.

The case of *Morpeth*, in Duke, 242, shows very clearly that the original jurisdiction in chancery is altogether independent of the statute.

Much the largest portion of equity jurisdiction has arisen since the 43d of Elizabeth. Bills for partition were introduced in the reign of James I.—1 Mad. Ch. 198. The granting of injunctions in chancery commenced about the same time. The first case of a bill *quia timet* was in 2d Charles II.—1 Ch. Ca. 121.

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The powers of that court were first fully developed by Nottingham, and afterwards greatly extended by Hardwick.

Its powers to give redress by bill and information in the case of charities, grew out of its general principles of relief, and the analogy which such cases bore to ordinary uses and trusts, the resemblance failing only when from the necessity of the case it must fail, viz. the vagueness of the trust which is essential to the existence and to the salutary administration of public charities. In both kinds there is confidence and trust.

A purchaser of the legal estate, for a valuable consideration, would be protected in chancery.

It is upon the general doctrine of trusts, that a court of equity in the case of charitable corporations, has original jurisdiction to relieve for abuse of management by the governors, *Rownsworth Hospital*, 15 Vesey, 314, and even where the heir of the founder being visitor, is one of the governors, *Vesey*, 519.) Under the general principle that a trustee cannot buy in the trust estate for his own benefit, the governors of a charity are not allowed to take to themselves leases of the charity lands.—*Attorney General vs. Clarendon*, 17 Vesey, 500.

Our last inquiry is, whether the law of charitable use is in force in this country, and will be carried into effect in our courts of equity so far as regards the bequests in this will.

These bequests are for a *definite purpose*. The different associations for whose uses they are given, are organized and in full operation. They form a scheme to administer this charity as definite as the scheme devised by the court, or under its direction in *Moggridge vs. Thack*, 7 Vesey, 40. There is no occasion for the interposition of government to direct the establishment of these charities. No schemes are required to be formed. Whether vague general charities, not having a fixed purpose, can be enforced in our courts of equity, it is unnecessary and immaterial to inquire. Whether our courts of equity can be considered as clothed with that special delegated judicial authority which is supposed in England to emanate from the prerogative of the crown, is also immaterial to the present purpose. When those questions fairly arise in a cause, it will be time enough to discuss and decide them.

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I propose to show,

1st, That these charitable uses, with a fixed definite purpose, are in force in this country, as part of the English common law, sustained and protected in courts of equity, and brought here by our ancestors, and that this position is supported by authorities in this country.

2d, That if this doctrine of charitable uses, and the equitable remedy in relation thereto, is considered as dependent upon the statute of charitable uses, the principles of that statute are in no force here as part of the local common law.

Terrel vs. Taylor, 9 Cranch, 43, was a bill exhibited by the members of the vestry of an Episcopal Church, on behalf of the congregation, against the overseers of the poor of the county and the wardens of the church, praying that the defendants be enjoined from claiming the land, and the wardens be decreed to sell the land for the benefit of the church.

The lands in question had been conveyed to the vestry in 1770. In 1801, the legislature of Virginia passed an act, vesting this, and all other real estate so held, in the overseers of the poor of the respective counties.

The court decided that the freehold of a church vests in the parson, but for the use of the church ;—that the conveyance passed the premises by estoppel, though the grantees could not hold it for the benefit of the church, (p. 59) ;—that it was immaterial whether the church was or was not a voluntary society ; for in equity, the same reason would exist for relief in the one case as in the other, (p. 45, 46) ;—that the freehold being in the parson, his consent to a sale would be necessary, which was decreed to be made with his assent. The act of 1801 was decreed to be unconstitutional.

The *Town of Pawlet vs. Clark and others*, 9 Cranch, 292, was an ejectment for lands in Vermont. The land was granted in the charter of the town of Pawlet, dated 26th August, 1761, by the former Governor of New-Hampshire, to 63 persons, in 68 shares, with a reservation of 5 shares as a glebe for the Church of England, as by law established. Afterwards, in 1802, there was a society of Episcopalians duly organized. The court decided that the legal interest in the share for the glebe was not vested in the other grantees, subject either to a *condition* or *trust* for the church, (p. 324) and that the church as such, was not a corporation ; but its real estate vests in the parson for the use and benefit of the church. There being no such church at the time of the grant, such a donation by the crown for a non-existing parish church, will take

effect as a dedication to pious uses. That this would conform to the doctrine of the civil law, which as to pious donations, Bacton has not scrupled to affirm to be the law of England, (p. 331, 332). These doctrines were determined to have been introduced into New-Hampshire and Vermont, (p. 333).

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In the case of the *Baptist Association vs. Hart's Ex'rs*, (4 Wheat. 1) which came up on appeal from the circuit court in Virginia, the court below being divided in opinion, the supreme court decided against the validity of the devise, the association not being incorporated. The land lay in Virginia. The statutes of charitable uses had been introduced into that state as part of their local law, and had been repealed. This of itself might have been sufficient to warrant the decision. But the Chief Justice has delivered an opinion on that case, which, if followed out, would prostrate almost all the property belonging to the religious and charitable operations of the country.

If this voluntary association could not, in equity, take property, as the almoners of a charitable or pious bounty, it follows that a legal estate could not be held in trust for them, whether individuals or a corporation should be the grantees; but there would be either a resulting trust for the donor or his heirs, or the grantees would hold the land, discharged of the trust. This is a familiar principle, applicable to all uses and trusts, and was thereby applied in *Morrice vs. the Bishop of Durham*, 9 Vesey, 319.

If that voluntary association, could take an equitable interest for lands for pious and charitable uses, then a court of equity, under another principle as broad as it is familiar, would not allow the equitable interest to fail for the want of a trustee, but would fasten the trust upon the lien at law. The great and well-earned fame of that distinguished Judge, has spread widely the influence of that opinion.

The case of *Beatty vs. Kurtz*, (2 Peters. 566) revived the lustre which had been thrown upon the doctrine of pious and charitable uses, in the cases cited from 9 Cranch, and which had been somewhat obscured by the opinion in 4 Wheaton.

A lot of land had been dedicated by Beatty and Richie, in 1769, to pious uses, by being distinguished and set apart, for the sole use and benefit of the German Lutheran Church. Soon after, the lot was enclosed by the society of Lutherans, who used it as a burying-ground, and erected a church. The defendants below, the heirs at law of the original founders, claimed the property. The society were not

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incorporated. There had been no conveyance to them, or to trustees for their use. The bill was filed by some of the members of the society on behalf of themselves and others, to be quieted in their possession; and the court decreed in their favor, deciding that if the appropriation is to be deemed valid at all, it must be upon other principles than those which *ordinarily apply between grantor and grantee*, and that it could be supported as a dedication to public and pious uses, (p. 583). Though the bill of rights of Maryland was referred to as sanctioning the application of that doctrine to the case, yet the same court say, in ——— vs. *White*, (6 Peters. 436) that the court sustained it on the ground that it was a dedication of the lot to public and pious uses, adopting the principle that had been laid down in the *Town of Pawlet vs. Clark*, (9 Cranch, 292) that appropriations of this description were exceptions to the general rule requiring a grantee;—that it was like a dedication of a highway to the public;—that it did not turn upon the bill of rights of Maryland, or the statute of Elizabeth, but rested upon more general principles, and that this was not a novel doctrine.

There is in this respect a resemblance between charitable uses and public property. Charities endowed for the relief of certain classes of individuals, are to a certain extent public: they are called *public charities*, though not altogether public property. Hence, if an information is exhibited on their behalf, a relator is required, (Mitford's Pleading). The equity right of the voluntary association of German Lutherans was a public charity, but not public in any other sense; and certainly not more of a public character than the American Bible Society, or the American Colonization Society. We find the same doctrines recognized and sanctioned by the supreme court in *Inglis vs. The Trustees of the Sailor's Snug Harbor*, (3 Peters. U. S. R. 99). These doctrines will be necessary to protect the unfortunate sailors, the meritorious objects of that bounty, against the malversations of the trustees, if any should take place.

The Massachusetts dispositions of property to charitable uses, are sanctioned and enforced, (*Bartlet vs. King*, 12 Mass. R. 537. *First Parish in Shapleigh vs. Gilman*, 13 Mass. R. 190). In *Bartlet vs. King*, the devise was to certain trustees in trust for the American Board of Commissioners for Foreign Missions, and their associates. The court considered the members of that board, for the time being, as entitled to take as trustees for the charity, there being two sets of trustees. The court consider trustees as essen-

tial to administer the charity ; and that it cannot be done through the instrumentality of a scheme formed of a voluntary association, as was the case in *Beatty vs. Kurtz* : But this arose from the circumstance that they have no *court of equity* in Massachusetts.—Such an association, therefore, could not sue or be sued in Massachusetts. In a late case (*Going vs. Emery*) in the supreme court of Massachusetts, we find the same principles recognized and applied.

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In *Bull vs. Bull*, (8 Con. R.) a bequest for poor relations was held good as a charitable use. In 2 Vesey, 87, 111, was a similar bequest, and it was maintained as a good charitable use.

Charitable uses are upheld in New-York, (*McCartee vs. The Orphan Asylum*, 9 Cowan, 479, 481,) in which Chancellor Jones went into a full and learned investigation of the subject ; and he further maintained, with great strength of reasoning, that if the administration of this branch of the law, by the chancellor, is not to be considered as ordinary equity jurisdiction, yet it formed an ancient head of chancery jurisdiction, and the chancellors in this country are clothed with similar power.—(See also *Bowden vs. McLeod*, 1 Edwards V. Chan. R. 589. 7 John. Ch. R. 292.

In New Jersey, in the case of the *Free Reformed Dutch Church of Acquackanock vs. The Executors of Ackerman*, there was a bequest of property, the interest to be applied to the maintenance of a clergyman. The bequest was held to be good, by Chancellor Williamson, as a charitable use.

In *Shotwell vs. Hendrickson*, the same doctrine was maintained by the court, and was essential to the foundation of the suit.

In Pennsylvania, charitable uses were maintained (in *Whitman vs. Lex*, 17 S. & R. 89, and *McGin vs. Aaron*, 1 Penn. R. 51) as part of the common law of the state. In the case of *Magill and others vs. Brown*, in the U. S. Circuit Court, before Justices Hopkinson and Baldwin, on the will of Sarah Zane, containing bequests to several Quaker Meetings, which were not incorporated, the court maintained the doctrines of the state courts of Pennsylvania, and showed that by long established usage in Pennsylvania, religious and charitable, though mere voluntary associations, were capable of holding property for pious and charitable uses, and as to such purposes, they were to be deemed incorporated. They further showed, in a very able, learned investigation of the subject, that this doctrine did not originate in the statute of charitable uses, but was part of the common law of England, derived from the civil law.—In North Carolina, in the case of *Griffin vs. Graham*, 1 Hawks'

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Reports, 96 and 97, the testator made his executors his trustees, and gave them all the residue of his real and personal estate in trust out of the rents and profits to establish a school for the maintenance of indigent scholars. The heir at law and next of kin exhibited their bill against the executors, in order to have the trusts avoided, and the defendants converted into trustees for themselves. The court decided that the 43d Eliz. was in full force in that state;—that independently of the statute, their court of equity had the like jurisdiction as the court of chancery in England. That in this case, it was a trust for a definite charity, with specific objects pointed out; and the court would take jurisdiction thereof, by virtue of its ordinary equity powers.

The case of the *Town of Pawlet vs. Clark and others*, in 9 Cranch, came up from Vermont, and is an authority to show that the law of charitable uses exists in this state.—*Stone, Ex'r, vs. Griffin*, 3 Vt. R. 400.

I propose next to show, that whether the law of charitable uses in England rests upon the statute of 43d Eliz. or is to be traced to a higher source, its principles have been introduced into this country, and may be maintained and enforced as *local common law*.

The people of this country are a christian people. Charity, both public and private, is, and always has been, widely spread and extensively practised. These remarks apply especially to New-England.

Chancellor Jones, in 9 Cowan, 477, says, "It would be a reproach to the christian character to say, that such charity had its origin in the reign of Queen Elizabeth." Would it not also be a reproach to the christian character of New-England to say that this law of charity has never taken root here? Wherever a disposition of property of a moral and salutary tendency, has long and extensively prevailed in a community, has become interwoven with the habits, feelings, practices and sentiments of the people, it forms part of their common law. This does not depend on judicial decision, but necessarily precedes it.

The conviction of the existence of such a practice in relation to the matter now under consideration, has often led courts to dispense with the inquiry into the origin of this doctrine; or if they make the inquiry, also to rest it upon the 43d of Eliz., and then to decide that the principles of that statute have been introduced *here*. Such was the case in *Griffin vs. Graham*, 1 Hawks' N. C. R. 96—*Whitman vs. Lax*, 17 S. & B, 89, and *Going vs. Emery*, lately decided in the supreme court of Massachusetts.

Dane, in the 4th volume of his Abridgement, page 5, says,

"The 43d of Elizabeth, in a special manner, made the true distinction in forbidding gifts to superstitious uses, and allowing those to charitable uses;—that the statutes of Mortmain were adopted in New-England, and that the statute of 43d Eliz. was in *principle* adopted by *our ancestors*." The introduction of these principles into Vermont, does not depend merely upon the general practices, habits and feelings of the community. We find trusts to charitable purposes expressly sanctioned and adopted in the constitution of Vermont. The 41st section provides that all religious societies or bodies of men, that may be united or incorporated for the advancement of religion and learning, and for *other pious and charitable purposes* shall be encouraged and protected in the enjoyment of the privileges, immunities and estates, which they in justice ought to enjoy, under such regulations as the general assembly of this state shall direct.

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A vast portion of property in every christian community must exist in this form. It is too late to inquire whether it should be so. The general sentiment and practice of the christian world, have settled that question. This principle, like every other, may be abused. The tendency of the age, however, is against superstitious and extravagant dispositions to charity. There no doubt are cases of indiscretion; and if they become general, the legislature could apply the correction. It would not be right to place this property beyond the protection of law, to encourage trustees and fundholders to be faithless. The radical error into which judges and counsel have often fallen, consists in supposing that these trusts may *exist* and yet not be *legal*. That they may exist through the intervention of a trustee, and yet not be protected in *themselves* without *his aid*. They must be either lawful or unlawful. If the latter, there can be no trust in their favor: If the former, equity will protect them without a trustee, by fastening a trust upon the *heir*; or if a trustee abuses his trust, he will be compelled to account, and a new trustee may be appointed.—See Seaton's Forms of Decrees, 128 to 134, 250, 251, and references.

Another radical error arises, from supposing that these vague trusts, as they are called, cannot *support themselves*, and therefore the trustee is considered as clothed with the equitable as well as legal estate; and of course, if the trust fails, the *whole* fails.

But there is no difficulty in conceiving that property, to be managed for the benefit of necessitous objects, to be sought out and relieved, should be protected in equity, and devoted to its legitimate

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purposes. That the trustees should account for abuse, and new trustees raised up as in other cases,—that the almoners of the charity should account for their mismanagement, and whenever the abuse is such that there are none to call them to account in behalf of these necessitous objects of the charity, the attorney general should interfere. The practical effect of this system is to protect such property instead of allowing it to be preyed upon.

I propose to show, in the next place, that there are in these cases competent trustees; that if the persons designated as treasurers cannot take under the bequest, the executors are competent trustees to pay over the money to the societies entitled to receive them; and that there are proper parties before the court to render such a decree as is called for by the pleadings and the facts of the case.

The bequest is to the treasurer for the *time being*, &c. This must be construed to be either, first, a bequest to him and his successors in a corporate capacity; second, a bequest to the *person* holding that appointment at the death of the testator, and payable to him in five annual instalments; or third, a bequest to him and those succeeding him in the appointment, until all the instalments are paid.

This cannot be a bequest to the treasurer in a corporate capacity, because he has no such capacity; and the court will not so construe it, if they can put any other construction upon it that will give it effect. The rule is too well established to admit of dispute, that you must so construe an instrument *ut res magis valeat quam pereat*.—*Town of Pawlet vs. Clark et al*, Cranch, 328. 12 Mass. 543. Hobart, 123. This may be construed so as to give it effect by considering the word treasurer as descriptive and applying to the person answering that description.—Bac. Abr. Grant C. A devise to the treasurer and was held to be good in *Owen vs. Bean*, Bridg. Duke, 486. The same is laid down in *Wellbeloved vs. Jones, Simons and Stewart*, 40. In *Waller vs. Childs*, Ambler 529, money, the proceeds of sales of real and personal estate, was bequeathed to be paid to the treasurer or treasurers for the time being, for the maintenance of dissenting students for the ministry, the bequest was sustained, and the treasurer not even made a party to the suit. It is no answer to say that it was not intended the treasurer should take a *beneficial interest*. Only a naked legal interest is given to the trustee, whether he was intended to take in his *individual*, or in a supposed corporate capacity. When the bequest or disposition is made to a voluntary asso-

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ciation, composed of numerous and uncertain persons, constantly changing, it cannot be presumed that it was intended they should take in their individual right. But where the class of persons, though numerous, may be reduced to certainty, they may be construed to take individually. Such is the case in devises to grand children, though numerous, and such was the case in *Bartlett vs. King*, 12 Mass. Rep. There is a class of cases where contracts are made by persons as treasurer, clerk, &c. and when the presumption is, that they made them as agents for others, and consequently were not liable. Such cases have no just application to the present case. The court then will have no difficulty in construing this a bequest, not to the treasurer in an official or corporate capacity, but to the *person answering that description*. The expression, *for the time being*, shows it was intended to be descriptive. It would be absurd to intend a bequest to a corporation in perpetuity, and add the expression, *for the time being*. It is, I think, manifest, the testator intended to use the term *treasurer* as *descriptive*, and that he intended one person to take, viz. the person answering that description at *his* death, when the devise takes effect. And for the following reasons:

1. The peculiar language of the will. It is given to the *treasurer* in the singular number, and is made payable to the said treasurer in five annual instalments.

2. This is a passive trust to terminate immediately, and not a continued active trust. It was to go to the uses and purposes of a charitable institution, organized and in full operation. If retained by him afterwards, it would not be in the capacity of *trustee*, but as the mere fund-holder of the society. 1 Sim. and Stew. 40. Amb. 526. In such dispositions the society is entitled at once to receive the money. The expression, *for the time being*, may refer to one particular time, as for instance, the death of the testator, or to a period of time. It was manifestly used in the former sense in 3 Peters, 99, and the word successors embraced the officers succeeding. It was used in the same sense in Amb. 526. But supposing the testator intended that persons successively answering the description of treasurer for five years should take in succession. This would be a shifting use, and being within the period assigned for allowing perpetuities, would be good.—6 T. R. *Daintry vs. Daintry*, 307. 1 B. and A. 713. Bro. Ch. Cas. 386. The objection to such dispositions in succession is, the danger of creating perpetuity; and whenever it runs beyond the limits allowed by the law, if it be a devise of real estate, it is declared *void*. If a

BENNINGTON, bequest of personal estate, the first person takes the whole interest.—Coke Lit. 466. In that view of the case, as this is personal estate, the person answering the description of treasurer at the death of the testator would take the whole legal interest subject to the charitable trust.

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But suppose the bequest of the naked legal interest is void, the executors in the will are *trustees*. They take in all cases personal estate in trust for legatees. Executors are chargeable in equity, upon the ground of trust, and are accountable as trustees, each being considered a trustee for the entirety.—Men. Chan. 466—467. *Rutland vs. Rutland*, 2 P. Wms. 211. 1 Atkins, 458. 1 Sch. and Le. F. 202. When a legacy is given to one person in trust for others, the executors of the primary trustees, it is a case of double trust, in this respect resembling the case *Bartlett vs. King*, 12 Mass. Rep. 543. If the legatee named as trustee could take as such, he would at once pay it over to the society. The society is entitled to receive it.—1 Sim. and S. 40. The executor can do the same. But if there had been an entire failure of trustees, if it had been a disposition of real estate, and the trustee named in the will had died in the life-time of the testator, or since, without leaving heirs, or if no trustee should be named in the will, it could not have vitiated or defeated the charitable disposition.

I have already adverted to the error of supposing that these equitable dispositions to charity require an actual trustee in being to support them. If they are too vague to be valid, a trustee will not make them good. If, on the other hand, they are valid, equity will fasten the trust upon the property, in whose hands soever it may be, with the exception of purchasers, for valuable consideration, without notice. Justice Story, 3 Pet. U. S. R. 486, remarks, that the rule drawn by Lord Eldon from a most learned and critical examination of all the authorities is, that where there is a bequest to trustees for charitable purposes, the disposition must be in chancery, under a scheme to be approved by a master. But where the object is charity, and no trust is interposed, it must be by the king, under his sign manual. Lord Eldon is not always happy in conveying his ideas with precision, however accurate his ideas upon legal subjects may be. I presume he did not mean to say, that in all cases the control of charities was under the king's sign manual, where there was not a bequest to trustees. In the case referred to, in which Lord Eldon made the remark alluded to, *Moggridge vs. Thackwell*, 7 Vesey 86, Vartin, the intended trustee, had died in the life-time, yet the chancellor took jurisdiction under

his general equity powers. The rule I consider to be, that wherever there is a general charity, with discretionary powers, it is not a trust.—7 Vesey, 85. The disposition and establishment of it, or in other words, the application of it to charitable objects according to some fixed plan or definite purpose, and thereby converting it into a trust, is in the king. But in the case even of general charities, when there are trustees with full discretionary powers of disposition, its disposition is not under the sign manual.—*Waldo vs. Baley*, 16 Vesey, 210, 211. If in the latter case the trustee should die, it then becomes a general charity, under the king's disposal.—*Attorney General vs. Berryman*, 1 Deck. Rep. 168.

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In the case of charities to be distributed according to a fixed purpose and among objects answering to that purpose, they are the *cestui que trusts*, uncertain in some measure, but still as certain as the subject of general charities will admit of; and in such cases, they are under the control of the chancellor, as already shown, in virtue of his general equity jurisdiction; and applying the general principle applicable to all trusts, equity will, when, by supplying a trustee, or converting the heir into a trustee. See the case of *Moggridge vs. Thackwell*, 7 Vesey, 86—*Attorney General vs. Lady Downing*, Ambler, 571—3 Peters, 119—Bridg. Duke, 163, which was a case upon ordinary judicial equity—*Beattie vs. Kurtz*, 2 Peters U. S. Rep.—*Pawlet vs. Clarke*, 9 Cranch, 292, in both which cases no trustee was created. In 1 Mad. Ch. Rep. 62, on the application of certain inhabitants, &c. a corporation who had committed a breach of trust were removed and new trustees appointed. See also *Bull vs. Bull*, 8 Conn. Rep. 51—9 Cowen, 484—5.

It only remains to show, that there are in this case competent parties before the court to enable them to render the requisite decree.

The bill is exhibited to settle the construction of the will, and that the claimants may interplead. The money is in the court, or under its direction and disposal. There is no complaint of breach of trust, no trustee to be appointed, no continuing trust required. The societies are entitled to the disposal of the money. There is no complaint or well grounded apprehension, that they will misapply the money. In such a case, the presence of the attorney general for the state is not necessary. In *Wellbeloved vs. Jones*, 1 Sim. and St. 40, the question came up directly before the court, and although in that case the presence of the attorney general was required, the court laid down this distinction. "It has been held

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not to be necessary that the attorney general should be a party when a legacy is given to the *treasurer* or other *officer* of some *established charitable institution*, to become a part of the *general funds* of that institution. And the exception is reasonable, for the *attorney general* can have no interference with the distribution of their general funds. Whenever there is a general charity not in trust, and the purposes of it are not established, if a suit is brought in respect to it to collect the funds, or for any other purpose, it must be in the name of the *attorney general*. For there are no competent persons to bring the suit.

In the case of charities with a definite purpose, and a scheme administered either by the trustees or others, or of charities administered by the trustees at their discretion, and in the latter case the trustees alone, or in the former case, the managers of the charity, in collusion with the trustees, abused the trust, then the *attorney general* must call them to account. But here there is nothing for the attorney of the state to do. The charitable institutions are entitled to the funds, they may sue and be sued in equity, in the name of one or more, on behalf of the others. It was so in *Beatty vs. Kurtz*, 2 Peters.

The proper person to sue and be sued on behalf of the institution is the treasurer. A payment to him is a payment to the institution. The attorney for the state, if before the court, would not receive it.

In the following charity cases, the attorney general was dispensed with:—*White vs. White*, 7 Vesey, 422. *Waldo vs. Baley*, 16 Vesey, 211. *Provost of Edinburgh vs. Aubery*, Amb. 236. *Oliphant vs. Hendrice*, 1 Bro. Ch. Cas. 571. *Campbell vs. Radnor*, 1 Bro. Ch. Cas. 271. *Curtis vs. Hutton*, 14 Vesey, 537. *McIntosh vs. Townsend*, 16 Vesey, 330. *West et al. vs. Knight*, 1 Chan. Cas. 134. *Pensted vs. Payer*, Duke, 381. The above case in Zanes's will. *Shotwell vs. Hendrickson*, above referred to. *Bowden et al. vs. McLeod*, 1 Edw. Ch. Rep. 588. *Coggeshall vs. Peltson*, 7 John. Ch. Rep. 292. *Jones vs. Williams*, Amb. 651—Ib. 524. *Moggridge vs. Thackwell*, 7 Vesey, 36. *The town of Pawlet vs. Clark's Ex'rs*, 9 Cranch. 4 Vin. 500.

It is well settled, that in charity cases as well as others, bequests may be made to foreign objects.—Amb. 236. 1 Bro. Ch. Cases, 571, 171, 444. 16 Vesey, 537. 4 Vesey, 433. 16 Ves. 330.

My purpose has been to show, that in a civilized country, with an enlightened administration of justice, that large portion of property, which, under the influence of Christianity, purified from the

effects of superstition, is entrusted to charitable institutions to administer to the necessities of the poor and afflicted part of the human family, is not placed beyond the pale and protection of the law.

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Smith and Robinson for the residuary legatees.—It is contended, on the part of the residuary legatees, that no persons are designated in the will, who can claim either at law or in equity, as trustee, or as *cestui que trust*; that the trust is ineffectually declared, and that the monies bequeathed vest in the residuary legatees, discharged of the trust.

1. The first inquiry to be made is, what was the intention of the testator; as indicated by the terms of the will.

(1.) It was obviously the intention of the testator to make the bequests payable to the treasurer of the several societies in his official and not in his private capacity.

There are no terms to be found in the will, indicating the testator intended he should take personally.

The monies are expressly given for the use and purposes of the society, and no personal benefit was intended the treasurer.

The language, therefore, in the will, "I bequeath to the treasurer of," &c. without any thing further, shows the treasurer takes during his continuance in office.

In the case *Attorney General vs. Tancred*, 1 Wm. Blk. Rep. 91, where a conveyance was made to certain officers of a corporation, and not to the corporation itself, and *Morrice vs. Bishop of Durham*, 9 Vesey, 399, and 10 Ves. 522, where the devise was to the Bishop for such objects of liberality and benevolence as he might approve of, it was held the individuals could not claim personally under the official description, for the plain reason no personal benefit was intended.

The case of *Attorney General vs. Cook*, 2 Ves. Sen. 273, where a bequest was made to a Baptist minister, is to the same effect. *Unquharth vs. King*, 7 Ves. 224. The rule is the same at law.—*Piggot vs. Thompson*, 3 Bos. and Pull, 147. 13 John. Rep. 38-9. Mass. Rep. 325. 2 Conn. Rep. 680. 1 Cranch, 345. 1 Chip. Rep. 296.

There is another expression in the will, which is decisive of the question, viz: "I give and bequeath to the treasurer for the time being of," &c. This is the most apt phraseology the testator could have selected, to make the bequest payable to the individual who should from time to time be treasurer. Such is the popular im-

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It has received a determinate meaning by judicial decision—it is of equivalent import with the word successor.

In *King vs. Morrice*, 4 East. 26, Lord Ellenborough says this phrase, 'time being,' means no more than *hodie diurne*; that it refers to individuals in succession. *The Attorney General vs. Munby*, 1 Merv. 327, is decisive upon this point. The grant in that case was made to the Rector for the time being; the grantor was the then Rector. The grant was held good under the mortmain act, as the grantor could not claim in his *private capacity*. *Inglis vs. Sailor's Snug Harbor*, 3 Pet. Rep. 147, Judge Story's opinion. It is used in the same sense by Lord Hardwick, in the case of *Baylies vs. The Attorney General*, 2 Atk. 239, and so in all cases and books, both at law and in equity.—*Paine vs. Archbishop of Canterbury*, 14 Vesey, 365. *De Garcin vs. Lawson*, 4 Vesey, 433, in note. *Attorney General vs. Lepine*, 19 Ves. 309. 9 Cow. 486.

There is another expression in the will, which is equally decisive, in the case of the Home Missionary Society. The expression alluded to is, "I do hereby direct my executors to pay said sum of," &c. to the treasurer of said society. The words "said treasurer," used in reference to the other societies, is an expression to the same effect.

The individual then to whom payment is made must at the time the monies are handed over, be the treasurer of the society.

In case of death or removal of the treasurer, payment must be made to his successor.

Besides, the treasury is the place of deposit—the office of treasurer is merely to keep the money. The expression used is, a direction to pay into the treasury the monies bequeathed, and of course the money must be paid to the individual who is from time to time treasurer.

In addition to this, the bequests are to be paid in five annual instalments.]

The treasurer of the several societies is elected annually, and consequently is liable to removal from office, and also death. This was all in the mind of the testator: hence he anticipates it, and makes the provision that the bequests should be payable to the in-

dividual who successively from time to time, holds the office of ^{BENNINGTON,}
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This too is admitted in the answers of the several treasurers filed ^{Ex'rs of Burr}
in the case. The monies are claimed in their official, not in their ^{vs.}
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2. It was the intention of the testator, the society should, in their character as such, execute the trust. The bequests are for the uses and purposes of the society, and of course it belongs to the societies to apply the monies.—*Baptist Association vs. Hart's Ex'rs*, 4 Wheat. Rep. 1. *Green vs. Dennis*, 6 Conn. Rep. 299 & 300.—2 Conn. Rep. 287.

3. There are no *cestui que trusts*, or persons named in the will, who can claim the benefit of the bequests. The monies being given for the uses and purposes of the society, before any person can claim it, it is necessary the society should select, or designate the persons or objects to be benefitted.

The American Bible Society was organized for the purpose of encouraging and promoting a wider circulation of the Bible without note or comment, throughout the United States, and their territories, and also in other countries, whether Christian, Mahometan or Pagan. Now what country, kingdom, state, city, town, or individual, can claim the benefit of this bequest?

The other bequests are of the same indefinite character, and it is perfectly obvious no one is designated to take beneficially.

2. Is a devise to a voluntary association, or community not incorporated, or persons in succession not incorporate, void at law?

It is a well-established principle at law, that a devise or grant to a voluntary association, or persons in succession not incorporate, is void.—1 Sw. Dig. 135. Coke Lit. 95, a. Shep. Touch. 235. Pow. on Dev. 337. Com. Dig. 35. *Jackson vs. Corey*, 8 John. 301. *Hornbeck vs. Westbrook*, 9 John R. 73. *Barker vs. Wood*, 9 Mass. 419.—12 Mass. 557. *Lockwood vs. Weed et al.* 2 Conq. 287. 1 Hen. & Mumf. 470. Petersdorf Abr. 8 vol. 91, note. *Baptist Association vs. Hart's Ex'rs*, 4 Wheat Rep. 1. *Attorney General vs. Tancred*, 1 Wm. Black. Rep. 91. *De Garcin vs. Lawson*, 4 Ves. 433, in note to *Corbyn vs. French*. Story's Opinion, 3 Pet. Rep. 6 Con. 293.

The authorities above cited, abundantly establish the position, that the bequest in this case being made to a voluntary society, or persons in succession not incorporate, is utterly void in law.

3. Can this court, as a court of chancery, establish a devise void at law?

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The treasurers not being incorporate, cannot claim or demand the monies, or sustain any suit for their recovery in equity. The societies not being incorporated, are in the same predicament.

The description of the *cestui que trust* is so vague that no persons can be found, who have such an equitable interest, as will enable them to claim in equity.

When an interpleading bill is brought, it must appear there are persons capable of interpleading.—1 Mad. Chan. 176. 2 Swift's Dig. 207.

If the orator in chancery is not entitled to sue by reason of any personal disability, the defendant may demur, as in the case where a bill is brought by an infant, feme covert, idiots or lunatics.—2 Mad. Ch. 292. 2 Sw. Dig. 219 & 224. *Lloyd vs. Loring*, 6 Ves. 773.

Where the bill was filed in a corporate character, and it appeared on the face of the bill, the orators were not entitled to sue in that character; it was held a demurrer would lie.

In the case of *Baylies vs. The Attorney General*, 2 Atk. 239, Lord Hardwick says, "Though the Alderman and inhabitants of a ward are not a corporation, yet as they have made the Attorney General a party, I can make a decree," &c.—most clearly intimating the alderman and inhabitants not being incorporated, could not sustain a suit in equity.

So in all cases where the bequest is to persons in succession, not incorporated, the suit in equity must be in the name of the attorney general.—*Attorney General vs. Tancred*, 1 Wm. Black. 91. *Attorney General vs. Cook*, 2 Ves. Sen. 273. 4 Wheat App. 8.

In the case of *Merrill vs. Lawson*, (4 Vin. Abr. 500) Lord Chancellor Parker stated the rule to be, when a charity is given to persons uncertain, and incapable of suing and being sued, the bill *ex necessitate rei* must be in the name of the attorney general.

The reasoning of Chancellor Jones, (9 Cow. 282 & 283) and also Judge Story, (3 Pet. Rep. 500) is to the same effect.

In the cases of *The Baptist Association vs. Hart's Executors*, *Ingliss vs. Sailor's Snug Harbor*, *McCarter vs. Orphans' Asylum*, *Town of New Rochelle*, (7 John. Ch. Rep. 292) and *McGir vs. Aaron*, (1 Penn. 49) the persons suing were incorporate at the time of commencing the suit.

In the case of *Bartlett vs. King*, (12 Mass. 542) and *Whitman vs. Lex*, (17 Serg. & Rawle, 88) there was a competent trustee appointed in the will to execute the trust.

So that there is no case to be found to warrant a suit in favor

of the society, or treasurers, or any other person, to enforce the present bequest.

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Whether the state, as *parens patriæ*, can claim these bequests, is a point which does not arise—the state not being a party.—4 Wheat. Rep. 50.

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In a case like this in England, there must be an express application to the king for a sign manual.—*Attorney General vs. Herrick*, Amb. 712.

The state cannot express its determination to claim the bequests except by special act of the legislature. This has been considered by some judges equivalent to the king's sign manual.

There is no probability that the state will ever interfere; and if not, the residuary legatees are entitled to the monies.

It is believed that if the state, as *parens patriæ*, should attempt to claim the bequests, and pass an act in any shape for that purpose, it would be of no avail.

The king holds his office by divine right, and has his prerogative in right of his regal dignity and out of the ordinary course of the common law.—1 Bl. Com. 239 & 240.

Can a right derived from such a source, and so perfectly odious, be set up in this country, and that too by a government having no power except what is derived from the people?—Fonb. Eq. 491, note last ed. 2 John. Ch. Rep. 389.

2. If the societies or their treasurers were to become incorporated, or there were any persons competent to sue, the court of chancery in this state have no power to enforce the bequest.

The constitution and laws of this state vest in this court only the equity jurisdiction of the English court of chancery—no distinction therefore can be made here, on the ground that charity is the legatee.

It is admitted that a different rule prevails in England when a bequest is for charity.

The king, as *parens patriæ*, has the superintendence of all charities.

The attorney general, at the relation of some informant, files *ex officio* an information in the court of chancery, to have the charity properly established.

The jurisdiction thus exercised, does not belong to the court of chancery as a court of equity, but as administering the duties and prerogative of the crown.—3 Bla. Com. 47, 427. 1 Bla. Com. 303, note. 2 Fonb. Eq. 207. Coop Eq. Pl. 27. Mit. Pl. 29. 2 Vern. 342. *Corporation of Burford vs. Lenthal*, 2 Atk. 551. 3 Pet. Rep.

Bannington, App'x. 4 Wheat, 47. 19 Ves. 284, ——— vs. *Sanderson*
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Smith et al. The law of charities in England originated in the statute of 43d Eliz. Ch. 4.—1 Fonb. Eq. 25, note, par. 1 ed. 1831. Rob. on Frauds, 358, and note. Rob. on Wills, 213. *Attorney General vs. Rye and Warwick*, 2 Vern. 453. *Attorney General vs. Boyer*, 3 Ves. 726. *Bishop of Hereford vs. Adams*, 7 Ves. 323. *Attorney General vs. Jackson*, 11 Ves. 365.

What seems to be conclusive on this point is, that no information lies in the name of the attorney general to establish a charity, not within the statute.—*Attorney General vs. Haven*, 2 Vern. 386. 4 Wheat. App'x, 8.

Shortly after the statute passed, it became a question whether the court of chancery could grant relief by original bill, (2 Fonb. Eq. 209) and that a bill of review was not allowable; and the reason given was, the chancellor derived his authority from the statute Cro. Char. 40.—*Windsor vs. The Inhabitants of Farnham*, 1 Bac. Abr. 592.

It was also held no appeal lay from the decree of the chancellor under the statute.—*Saul vs. Wilson*, 2 Vern. 118.

Since the passage of the statute, it has become a general rule that no uses are to be considered as charitable except such as fall within the words or obvious intent of the act.—9 Ves. 399. 10 Ves. 538. 4 Wheat. App'x, 6. *Attorney General vs. Brewer*, 1 Swanst. 282, 299, 307.

It has been shown the bequests in this case are void at law. And it is contended independent of the statute of 43d Eliz. Ch. 4, the chancellor in England has no power to sustain a bequest void at Law.—Lex. Testa. 133, 139, 147. 1 Swinb. 106, note. 2 Bl. Com. 376. Rob. on Frauds, 353. 1 Bac. Abr. 582, 583, 585. 1 Cha. Cas. 134, 267, 195. *Smith vs. Stowell*, Cas. in Chan. 195. *Attorney General vs. Boyer*, 3 Ves. 726. 1 Burr. Ecclesiastical Law, 226.

There is no case, nor can a trace be found in any book, of an attempt in chancery to establish bequests void at law before the statute.

In Porter's case, (1 Co. 22, b.) the will was made in the 32d Hen. 8, to the wife of the testator, on condition she should, on the advice of learned counsel, assure the property devised for the maintenance of a free school not incorporated. The wife entered into the property, and instead of performing the condition, conveyed in the 3d Ed. 6, by a lease for forty years. Afterwards, in the 34th

Eliz. the heir entered for condition broken, and conveyed to the queen ; and suit being soon after brought, the court decided the condition was broken, and the entry of the heir was lawful.

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Now in this case, it was not even suggested there was any remedy for the free school in chancery.

The only mode intimated to help the devise was by act of incorporation and letter of licence.

Lord Coke, who argued the case for the queen, though he cites many antecedent cases, refers to none which were not decided at law. Besides those claiming the beneficial interest, made no effort from the time the will was made, or at any rate from the time the condition was broken, until the 34th Eliz., and then they resorted to the circuitous mode of procuring a conveyance to the queen, on whose will the charity would still depend.

Can there be any pretence for saying there was all this time a remedy in chancery for the *cestui que trust*?

In Hobert, 136, two cases are to be found, where, immediately after the passage of the statute, questions on the validity of wills containing charitable uses void at law, were propounded to and decided by courts of law. This has always been the practice in courts of chancery, and if that court had the power of sustaining such bequests before the statute, similar cases would be found in the law reports.

Bequests made before the statute, and void at law, were, after the statute, looked up, and held to be within the statute. The statute was expressly made retrospective, and these cases were decided on that ground.—*Flood's* case [Hobert, 136—*Collinson's* case, Hob. 136—*Smith vs. Stowell*, 1 Cas. in Cha. 195—*Damus' case* and *Rivett's* case, Moore, 822, 890—See *Attorney General vs. Rye & Warwick*, 2 Vern. 453, and old cases therein cited.—See for same purpose *Lex Testa*. 140 to 147.—3 Pet. Rep. 492.

The cases immediately succeeding the statute where bequests void at law were held good as charities, were wholly argued and decided on the footing of that statute.—*Parish of Great Creaton*, 1 Ch. Cas. 134.—*Attorney General vs. Platt*, Ch. Cas. 267, and Finch, 221.—*Smith vs. Stowell*, Cas. in Chan. 195.—*Attorney General vs. Tancred*, 1 Wm. Bl. Rep. 91.—*Attorney General vs. Cook*, 2 Ves. Sen. 273.—*Jones vs. Williams*, Amb. 651.—*Attorney General vs. Rye & Warwick*, 2 Vern. 453.—*Piggot vs. Penrice*, 2 Eq. Cas. Abr. Sec. 6. *Att'y Gen. vs. Hickman*, 2 Eq. Cas. Abr. 193, Sec. 14.—*Lex Testa*. 147, *Rex vs. Newman*.

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Since the passage of the statute of Eliz. the chancellor in England cannot support bequests, where the conveyance is defective, or the objects are incapable of taking, or not sufficiently defined, unless the bequests are made to objects enumerated in the statute, or by analogy deemed within its spirit and intendment.—*Morrice vs. The Bishop of Durham*, 9 Ves. 399. S. C. 10 Ves. 538. *James vs. Allen*, 3 Merv. Rep. 17. *Vesey vs. Jameson*, 1 S. & S. 62. *Fowler vs. Garlike*, R. & R. 232.

The last two cases are cited in the 17th vol. of the American Jurist, 134. *Coxe vs. Bassett*, 3 Ves. 155 & 164. *Att'y Gen. vs. Whorwood*, 1 Ves. Sen. 534, cited 9 Ves. 400. See 4 Ves. 434, *Corbyn vs. French*, note. See also 10 Ves. 534, 538. *Brown vs. Youle*, in note to *Moggridge vs. Thackwell*, 7 Ves. 50. *De Gracin vs. Lawson*, 4 Ves. 433, in note. *Widmore vs. Woodruffe*, Amb. 640.

The cases in the United States, where the question now under consideration has been agitated, fully sustain the position that a bequest to a trustee incompetent to take, or which is the same thing, where no trustee is appointed for an indefinite charitable object, is void in equity as well as in law.—*Baptist Association vs. Hart's Ex'rs*, 4 Wheat. Rep. 2. 3 Pet. Rep. App'x, 484, 485, 488, 498. *Ingliss vs. Sailor's Snug Harbor*, 3 Pet. Rep. 114, 115, 138, 139, 142, 149, 152. *Dashire vs. Att'y Gen.* 5 Har. & John. Rep. 392. *McCartee vs. Orphan Asylum Society*, 9 Cow. Rep. 469.

In the case of *The Town of New Rochelle*, (7 John. Ch. Rep. 292) the question now under consideration was not raised. Chancellor Kent only cites two cases, and both were decided subsequent to the statute 43d Eliz.

The first case, *Att'y Gen. vs. Clarke*, (Amb. 422) was decided upon the statute, and the charity was administered under a scheme.

In the other case, *Jones vs. Williams*, (Amb. 651) the devise was held as being against the Mortmain act, and in defining a charity, the chancellor refers expressly to the statute 43d Eliz. chap. 4.

It is said in this case, on the part of the societies, that in a court of equity, a trust can never fail of effect for the want of a trustee, and the court may therefore supply trustees to carry into effect the interests of the testator.

On examining the cases introduced on the other side in support of this position, it will be found either 1st that the trust was definite, and there was a *cestui que trust* designated in the will competent to sue, or 2d, that the suit was a proceeding under the stat-

ute 43d Eliz. chap. 4. But where there is neither trustee nor *cestui que trust* designated in the will, no case can be found where independent of the statute 43d Eliz. chap. 4, the court have supplied a trustee.

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Aside from that statute, the rule in equity is well settled, that every trust must have a definite object, and there must be some one in whose favor the court can pronounce a decree.—9 Ves. 323, 404.—10 do. 538.

Whoever is made trustee, the duty must be performed under the eye of the court; and how can the court select and designate the purposes and objects to which the money shall be applied? Can the court exercise a discretion?—*Widmore vs. Woodruffe*, Amb. 640. *Brown vs. Higgs*, 4 Ves. 703—5 Ves. 495—8 Ves. 570.—*Cruwys vs. Coleman*, 9 Ves. 324.

3. The statute of 43d Eliz. and the doctrine of charities which obtain in England, has never been adopted in this state.

(1.) This statute has never been re-enacted in this state. It will hardly be pretended that this statute was in force in this state during our colonial existence, since it was a principle of the common law that English statutes did not extend to the colonies unless specially named.—2 Kent's Com. 6, note *a*. 2 Salk. 311, 2 P. Wm. 75.

(2.) Every government has a general law regulating the settlement of testate and intestate estates. Our statute recognizes but one privileged testament—that of a soldier in actual service, or that of a mariner at sea. The statute of Eliz. and the system which had grown up under it, were known to our legislature, and if applicable to this country, would have been adopted.

(3.) The statute of Eliz. is one of local policy, and connected with local establishments.—*Att'y Gen. vs. Stewart*, 2 Merv. 160. 5 Har. & John. 403. 9 Cow. Rep. 481. 2 Kent's Com. 232 & 287.

(4.) The doctrine of charities is not a legal, but a prerogative system, and cannot be adapted to our form of government.—1 Bl. Com. 303, note 15. Bl. Com. 47 & 427. 2 Fonb. Eq. 207. Coop. Eq. Pl. 27. 2 Vern. 342. 4 Wheat. 47.

(5.) How has this doctrine been viewed by all the modern chancellors? Lord Eldon (in 11 Ves. 365) said, it had been urged by the defendant, and two hundred years ago might have been urged with effect, that no distinction ought to be made between a charity and an individual.

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The same chancellor, (in 19 Ves. 486) in speaking of the case *Moggridge vs. Thackwell*, says, he decided that case, being bound by precedent, and as much against his inclination as any act of his judicial life.

Lord Chancellor Cowper, (4 Wheat. App'x 14) in a case where he was called upon to declare a charitable bequest valid, the will not being executed according to the statute of frauds, observed, "I shall be very loth to break in upon the statute of frauds and perjuries in this case, as there are no instances where men are so easily imposed upon as at the time of their dying, under the pretence of charity."

In looking over all the more modern cases, we find a uniform regret that ever a distinction was made between a charity and an individual.

A constant endeavor to abridge the doctrine, a settled determination not to apply it in a new case, and whenever a charity is upheld, it is on the ground the chancellor is bound so to do, by the force of ancient precedents. Besides, the system is now completely annihilated by act of parliament, 9 Geo. II., commonly called the Mortmain Act.

This act, by all writers, is said to be founded in good sense and sound policy.—2 Mad. Ch. 62. 4 Wheat. Rep. App'x, 22.

In every point of view, therefore, the trust fails, and the money vests in the residuary legatees. The residuary clause passes all personal property not effectually disposed of, as when a legacy lapses by the death of the legatee in the life-time of the testator, or when a bequest of lease-hold estates being to charity is void by statute of 9 Geo. II.—1 Sw. Dig. 457. 2 Bl. Com. 514. 4 Bac. Abr. 429. Toller. Ex. 342. 7 Bac. Abr. 146—7. 2 Cai. Cases in Equity, 336.

The opinion of the court was delivered by

WILLIAMS, Chancellor.—The case before us is not only important on account of the principles which are to be decided, but also as it decides the right to property of some amount. It was argued two years since; but the court did not think proper, on the first argument, to decide a case, where the principle involved was so important, and where the decisions in the several states on the subject had been in some measure contradictory. A change having taken place in the members of the court after the first argument, the case was again heard a year ago. As there was only three members of the court present at that time, and their views on the

subject were not alike, it was thought proper to continue the case for further argument; and to prevent any further delay, that it should be heard at this term, by all the judges of the court.

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The case now, as heretofore, has been fully and ably argued; and probably all the authorities which have any bearing on the subject, have been brought to our notice. Unfortunately, we are not *now* agreed. We have endeavored to bestow upon it, both now and at the previous arguments, all the consideration which our time would admit; and although we are not all agreed, we are persuaded that this disagreement arises from the difficulty of the subject itself; and that there is no prospect that at any future time, or by any other court, there would be more unanimity.

It is not to be expected that the court would hereafter ever be unanimous; and there can be no use in protracting the decision to any future period. It cannot be necessary, in delivering the opinion of the court, to go into a particular examination of all the cases which have been read or cited. It is due however to the counsel, as well as to the case, to examine the several points which have been made in the argument, as well as the cases read or referred to, in their support; and if they are not mentioned, it is not because they have not been attended to.

In delivering the opinion of the court, I shall only mention the reasons or authorities which have influenced me in coming to a conclusion on this subject. The other members of the court, who concur in the decree, may have been influenced by other and more pertinent and forcible reasons and arguments.

The different parties who claim these legacies, are brought before us by the executors. The funds to pay the same, are placed under our direction; and we must now determine whether these legacies are to be, or can be paid, according to the intention and direction of the testator, or whether that intention is to be frustrated, and the money decreed to the residuary legatees, because his intention cannot be carried into effect under the existing laws.

The first question which presents itself is, whether the several societies, to whose treasurer the legacies are directed to be paid, not being incorporated, can receive the legacies for the purposes for which they were given, or whether they can receive and distribute a gift or legacy, given to a public, pious, or charitable use. I shall not inquire whether the uses intended were of that kind which are denominated pious or charitable, as this has not been denied in the argument; and indeed they are strictly of that char

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acter which by all the writers, either on the civil or common law, are denominated pious or charitable uses.—Domat. 2 vol. p. 168, and Seq.

I think we shall find, that societies, or bodies of men, unincorporated, have ever been considered, at common law, as capable of receiving gifts or legacies, to be applied to charitable uses ; and that it has been the invariable policy of our state, to consider them as capable. That they were considered capable at common law, is apparent from the fact, that it was found necessary to pass a statute to make void grants in trust for them. The statute 23d Henry VIII. chap. 10, declares, “ If any grant of lands or other hereditaments, shall be made in trust to the use of churches, chapels, church-wardens, guilds; fraternities, commonalties, companies, or brotherhoods, to have perpetual obits, or a continual service of a priest forever, or for 60 or 80 years, or to such like uses, or intents, and purposes shall be void, *they being no corporation, but erected either of devotion, or else by common consent of the people.*”—15 Viner. 481.

The passage of this statute, shows that at common law, the want of a charter of incorporation was no impediment to a body of men, changing from time to time, from receiving and distributing according to the intent of the donor, money, or other property, given or granted for a charitable use.

By the statute of 1 Edward VI. chap. 14, all, and all manner of colleges, free chapels, and chauntries, &c., and all manors, lands, teneiments, &c. belonging to them, were given to the king. In *Adams and Lambert's case*, (4 Coke, 96) where the question was discussed, what chauntries, &c. were given to the king by that act, the distinction between those which were incorporated and those which were not, was recognized ; and although it was resolved that the statute only intended such chauntry as was lawfully incorporated, or at least, had the countenance or beginning of a corporation, yet it was considered that some chauntries, which existed only in reputation, were by that act given to the king : thus it was said, that when a college or chauntry, &c. had such beginning, which might be made a lawful foundation, but for error or imperfection in the penning or proceeding of it, was not in judgment of law lawfully founded, such college or chauntry is given to the king by the said act ; but when they existed only in reputation, they were not given to the king. Several instances are there mentioned, where lands are given for the use or purpose of chauntries not incorporated.

In *Porter's* case, (1 Coke, 21) which is a very prominent one in all the arguments which have been made on the subject of charitable uses, and to which our attention will be directed in another part of the case, we find the existence of such societies or companies not incorporate, very distinctly recognized. The testator had devised certain lands to his wife, upon condition that she should assure, give and grant the same for the maintenance and continuance of a certain free-school, certain alms-men and women forever. The condition was not performed, and the heirs entered, and granted to the queen. Porter, who had under the devisee, claimed the land upon the ground that the condition in the will was against law, and so the estate was absolute in the devisee. It was argued for him, that though the object was a work of charity, and good in itself, yet that the statute of 23d Henry VIII. chap. 10, was intended to abolish good uses as well as others, that the intent of the statute was for the benefit of the lords, and that feoffments made to the use of companies *not incorporate*, were as prejudicial to lords as alienations in Mortmain.

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Sir Thomas Edgerton, who was then attorney general, and Sir Edward Coke, for the queen, contended that the use was not void; that neither the act aforesaid, or any other laws of Henry VIII. or Edward VI. were intended to abolish good or charitable uses, but that they were intended to be maintained—that it would be dishonorable in the law to make such good uses void; and they said, that almost all the land belonging to the towns or boroughs, *not incorporate*, are conveyed to several inhabitants in trust and confidence to employ the profits to such good uses as repairing highways, repairing the church, maintaining the poor of the parish, &c.; and they seriously contended that the statute of wills, by excluding bodies politic and corporate from being devisees, intended to make *companies not incorporated* capable of receiving a devise. It is to be remarked however, that on this latter point, the court did not deliver any opinion; yet the court decided, that the statute was not intended to extend to take away the good and charitable use. It is certainly worthy of remark, that all the counsel in the case distinctly recognized unincorporated companies as capable of being *cestui que trusts* in a gift or grant to a charitable use.

In a case decided in the circuit court in the district of Pennsylvania, on the will of Sarah Zane, Judge Baldwin, in an opinion in which he investigates the whole subject of charitable uses, remarks, that the common law requires no charter to enable a body of men in any place, to purchase chattels, or receive donations of money, a chat-

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tel interest, or an estate, for the lives of the grantee in land by their name as a body, without other words, "that a charter is necessary, to enable them as a natural person, capable of enjoying an estate in fee, without words of inheritance," to which it may be added, that to enable them to have perpetual succession, or to receive goods or personal property in succession, probably an act of incorporation is necessary. In this state, it appears to me, that a decision that a company of individuals are incapable of receiving gifts, for a public or charitable purpose, or that such a society should not be protected in the enjoyment of property given to them, (and I can make no distinction between protecting them in the enjoyment of property of which they are actually in possession by gift, and enabling them to recover that which is bequeathed to them by will) would be at variance with all our received ideas since the establishment of the state—at variance with the constitutional provisions made on the subject, and directly at war with the principles of religious freedom. It has always been the practice in this state, and may be considered as their settled policy, to encourage voluntary associations for public, pious and charitable purposes. All corporations at times, and religious corporations at all times, have been viewed with a jealous eye. It is very rare that any acts constituting an ecclesiastical or eleemosynary corporation, or for any religious purpose whatever, have been suffered to pass the legislature. But a few years since, when an act incorporating "The Baptist General Convention," which was solely for the management of their funds, had passed the house of assembly, it was met in the council, by reasons so able and so unanswerable, that there was no further disposition to press the subject upon the consideration of the legislature. It has been considered by community generally, that associations may be formed, money subscribed and collected, property given and received, for the promotion of any cause interesting to the public, and designed to subserve their interests, or for the encouragement or promotion of charity, morality, learning, or religion. So far as it respects the support of religious teachers, or ministers of the gospel, the spirit of our constitution and laws has for a long been considered as opposed to any legal provision. And although laws were formerly passed for the support of the gospel, and making provision by law for collecting taxes for their support, yet these provisions were rejected by most of the religious denominations among us. They created so much dissatisfaction, that their repeal was imperiously demanded, both by public sentiment and by the constitutional tribunal, whose duty it is to inquire whether the con-

stitution has been regarded. Our statute for the support of the gospel, passed in 1797 and in 1814, (page 600 and 601 of statute) yet contains a provision, that voluntary associations for hiring a minister, or erecting a place of public worship, or for the settlement and support of a minister, may for some purposes become a body corporate. Yet it is believed that a great, if not the *greater* part of our religious teachers, are supported and maintained by voluntary associations, who do not avail themselves of the provision of the statute to become incorporate. Associations for all public, pious and charitable purposes, have taken subscriptions, held property which has been given to them either by contribution or otherwise, and performed all and every act necessary for the objects contemplated by their association, without any doubt being entertained of their ability so to do. Legacies have been given for public and charitable purposes, and no questions made as to their legality or validity. Every constitution of government which has ever existed since we became a state, have recognized these voluntary associations as deserving of encouragement, and have considered them as standing on the same ground, whether simply *united* as a voluntary association, or *incorporated* by an act of the legislature. The 41st section of our constitution provides, "That all religious societies, or bodies of men, that may be hereafter *united* or incorporated, for the advancement of religion and learning, and for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities and *estates*, which they in justice ought to enjoy, under such regulations as the general assembly of this state shall direct." I think it may at least be said to admit of a doubt whether this clause in the constitution does not, in fact, give to all voluntary associations, for the purposes therein expressed, more extensive and large powers, than have ever been claimed for the associations who are made the subjects of the bounty of Mr. Burr in this will. All that is asked for by these associations is, that they may receive, for the purposes of their association, either a gift of money from a person living, or legacy from him, to be paid after his decease. It may be contended, that this clause in the constitution is intended directly to place bodies of men, united for the purposes there mentioned, on the same ground as bodies incorporated, so far as to enable them to receive property given to them, and protect them in the enjoyment thereof, subject only to be regulated by the general assembly, by some general law, applicable to all such associations, whenever the public interest should require such regulation: And until such law should be passed that

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Leaving this part of the subject, however, to be disposed of whenever it shall become necessary to decide upon it, I shall only remark, that no legislative provision is necessary to enable any body of men to avail themselves of the benefit of this clause in the constitution. The legislature may regulate, or they may restrain within proper limits, all these societies ;_but their aid is not necessary for the purpose of enabling the bodies of men united for the purposes contemplated by the constitution, to enjoy what the constitution has guaranteed to them. To decide or declare that a charter or act of incorporation is necessary to enable a society or body of men, united for the advancement of religion, learning, or other pious or charitable purposes, to carry into effect the objects of their association, or to be protected in the enjoyment of their estate, would be in effect to decide that our religious liberties were dependent on the will of the legislature, and not guaranteed by the constitution ;—that the legislature might interfere with the right of conscience, and the free exercise of religious worship, by granting a charter of incorporation, with large powers and capacities to the members of one religious sect or denomination, and withholding such charter from those of a different sect. Although the legislature have, in the instance before alluded to, for the support of the gospel, thought proper to declare these privileges and immunities, and in some measure to enlarge them by providing that they may become incorporate, yet they have never thought proper either to regulate or restrain them from the freedom of opinion on religious subjects, which it has always been our policy to tolerate and allow. No statutes of Mortmain have been passed, as none have been required for the interest of the public,—no statute to prevent superstitious uses. We have a better protection against superstition, in an enlightened public sentiment, than from any statutes,—no statutes to promote one sect of religion, to the exclusion of another. Error of opinion on this subject is to be corrected by reason and reflection. No statutes to restrain or to encourage charitable donations or legacies, believing that men, as to this, were better able to judge for themselves, than the legislature to judge for them. No fears have been entertained by our legislature, that heirs might be improperly disinherited—that religious societies would grow too rich or powerful—that any one denomination or sect could so far obtain the ascendancy as to persecute the other, or deprive them of

the free exercise of their particular opinions or dogmas; but the good sense of the people has been considered as amply sufficient to guard against any evils which might be supposed to arise from the want of legislation. From the neglect of the legislature to make any provisions on this subject, we may infer, that whatever sentiments or feelings individuals may have had or expressed, they at least, as a body, are fully satisfied that no injury can arise here, from the unrestrained exercise of religious freedom;—that they are convinced, that none of the reasons, which in another government dictated the statutes of Mortmain, the statutes to restrain gifts to superstitious uses, or the statute to regulate or restrain gifts to charitable uses, have any existence in this state. Individuals may here associate for the purpose of erecting a public monument, or any works of public utility, any memorial of heroism, patriotism or valor—they may unite for the purpose of erecting a monument in commemoration of the battle of Bennington, as they have in another state of the battle of Bunker Hill—may erect houses of public worship, print and distribute books, tracts, political or religious papers or pamphlets—may receive subscriptions or legacies therefor, and the law will so far encourage them as to protect them in the enjoyment of whatever may be received or bequeathed for that purpose. The different denominations of christians, whether Catholic or Protestant, the Jew or Mahometan, may here associate for the purpose of enjoying their particular religious tenets, build churches, monasteries, synagogues, or mosques, and are equally entitled to the protection of the law.

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When we are told, then, of the danger of building up a system of charities—of the danger of disinheriting heirs, or of wills or testaments made by persons in extremes, and are referred to the statute of Geo. II. as wholly destroying bequests for charitable uses, we can only answer, that when the legislature apprehend any such danger, they will provide against it; and until they do, we must administer the law as we find it to be, without any fear of any such consequences.

In considering the powers and capacities of voluntary associations or companies, I have not considered whether they are capable of receiving goods in succession, or whether they have a perpetual existence, as it is not required by the case before us. The legacies here given and claimed by the associations, mentioned in the will of Mr. Burr, do not contemplate a perpetuity or require a perpetual existence in them, to carry into effect the intention of the testator. It is an attribute of a corporation aggregate, to re-

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ceive lands or goods in succession, and a gift or grant to them, without any term of inheritance, or succession give to them, the whole property in the thing granted. Their life is a perpetuity: Hence a grant to them, which in the case of an individual, would only convey an estate for life, is a grant to them and their successors. It is not claimed by, or conceded to these societies, that they can purchase lands in the name of their association, which shall go to those who succeed them, or that they can take a bond or obligation, and maintain a suit thereon by that name, unless they can claim such an immunity or right, by virtue of the constitution before mentioned, which is not here insisted on. It is contended, however, that they may receive a gift of money for a charitable use,—that they may be protected in the enjoyment of whatever is thus given, and that if they are disturbed in this enjoyment, they must have some appropriate remedy therefor; and thus far the court are disposed to say, that both by the common law and the usages and practices of this state, as recognized by the constitution, they are capable, and may be protected.

As these associations for public and charitable purposes are found to exist among us—as they have ever here existed, are recognized and provided for, and their immunities and privileges guaranteed by the constitution—as they have always existed both in countries subject to the common law and to the civil law, and a vast amount of property has always been given, and is still given to them, to promote works of public utility, convenience or ornament, or works or acts of piety, learning or charity, it is important to inquire whether they can be thus protected in the enjoyment of their property. And here it will be perceived, that unless they can come into some tribunal, provided for the administration of justice—unless some court has jurisdiction over them, they are without the pale of the law, and their whole funds at the mercy of every one who may be disposed to invade them. If their treasurer should squander their funds, or any one who receives their subscriptions should choose to appropriate the money to himself, there could be no tribunal to call them to account. It is believed, however, that they can be protected in the enjoyment of these funds, by courts of justice,—that a suit can be maintained against any one who illegally comes into the possession of their property,—that a bond or note, given upon good and valuable consideration to them, even by their name of association, might be collected in the name of some proper party, connected with their right to hold money or property given to them, and to maintain actions against one who despoils them of it, must

be the right to sue in a court of justice, and to demand before a proper tribunal, legacies given to them by a will.

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The cases are numerous where associations of this kind have been recognized as entitled to equitable rights, and as competent to come into a court of equity in the name of one or more of their members, for the benefit of the whole.

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In the case of *Terrel and others vs. Taylor*, (9 Cranch, 43) Judge Story remarks, that if the plaintiff have shown a sufficient title to the trust property, the court could grant the relief prayed for,—that it can make no difference whether a society was incorporated or not; for in equity, as to objects which the law cannot but consider as useful and meritorious, the same reason would exist for relief in the one case as in the other. It is to be noticed, that in this case, there was a bill filed by the plaintiffs, as members of the vestry of the church in Alexandria, in behalf of themselves and other members of the church. In *Beatty and others vs. Kurtz*, (2 Peters. 566) a bill was sustained in the name of a committee of a voluntary society. Lord Eldon, in *Cockburn vs. Thompson*, (16 Ves. 321) and Lord Thurlow, in *Buckley vs. Carter*, (cited in *Pierce vs. Piper*, 17 Ves. 11) recognize the same principle. In *Waller vs. Child*, (Amb. 526) on a bill brought by the heir at law, to set aside certain charitable bequests, to be paid to the treasurer, for the time being, of a voluntary society, the society was recognized as capable of receiving and disposing of the legacy, and decree was made that the money should be paid to their treasurer. *Wellbeloved vs. Jones* (1 Simons & Stuart, 40) was a bill brought by the trustees or officers of an unincorporated society: Their right to maintain the bill was established, as well as their capacity to receive a legacy for a charitable use. Several cases of a similar import have been decided in the several state courts, which it will be unnecessary to examine at this time. It is sufficient for the present to say, it appears to me that the position is established, that voluntary societies, by the common law, were considered as capable of receiving and distributing money and other property given for public or charitable uses,—that they are recognized by the constitution of this state, as existing and to exist for that purpose,—as deserving of encouragement, and entitled to protection in the enjoyment of their estates, and that their rights may be asserted in, and by the judicial tribunal.

This view of the subject alone would in my mind be decisive of the question submitted to us in the present case. The whole doctrine, however, in relation to charitable uses, as well as the juris-

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It has been asserted, on the part of the residuary legatees, that the law in relation to charitable uses, as well as the jurisdiction of the chancellor over them, is founded wholly on the statute of 43 Elizabeth, sometimes called the statute of charitable uses. That there is a law, or a series of decisions on this subject, establishing or recognizing a rule in relation to them, different from the rules in relation to other subjects, is unquestionable. It is, however, denied that this rule either is founded on that statute, or grows out of any considerations connected therewith; but rather that it arises necessarily from the nature of the use itself. The statute of Elizabeth does not profess to establish any new law upon this subject. The gift, limitations and appointments, which were to be carried into effect under that statute, existed anterior to the passing it. The principles of the law itself, as now recognized, as well as some of its most objectionable features, were known in England long before the passing of that statute. The passages which have been read from Domat, the prevalence of this law wherever the civil law prevails, the several cases which will be noticed, the remarks of Lord Thurlow in *White vs. White*, 1 Brown C. C. 15, and the remarks of Chancellor Kent, warrant this opinion. Judge Story considers that the principle of the civil law respecting charities was engrafted into the common law; and Judge Johnson says, that it appears to him demonstrable, that the 43d Elizabeth introduced no new law of charities, and made none valid, not valid before.

From the very nature of the subject, the donations to such uses must be vague and indefinite. The objects to be benefitted are numerous, and must be looked up and ascertained, and the relief must be administered according to the direction and judgment of those who are to select the necessitous objects for whose benefit the use is created; and moreover, the charitable uses themselves will be declared according to the spirit of the age in which they are established. We find that there were a great variety of gifts and grants to pious and charitable uses recognized by the statutes, as well as by the decisions of the courts of justice, from a very early period. They mostly, it is true, partook of the religious character of the age, as for the exercise and celebration of divine services, to find chaplains, &c., many of them for hospitality and the relief of the poor; but very few, however, if any, for the establishment of schools of learning, until the time of Edward VI. In almost every reign, we find that this subject engaged the atten-

tion of parliament, and that men piously or religiously inclined gave property for the purposes then considered charitable and meritorious.

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In the case reported by Sargeant Bendlow, mentioned in Porter's case, and in the note to Porter's case, which was before the 43d Elizabeth, a variety of charitable and meritorious purposes are enumerated, for which lands, tenements, or hereditaments may be given, the objects of some of which must have been vague and indefinite, such as for the use of poor people, the relief and comfort of maimed soldiers, sustenance of poor people, discharging poor inhabitants of common charges, marriage of poor virgins, &c. Whenever a statute was passed on the subject, it was not to create any uses, but either to restrain or to regulate them in such a manner as that the charitable intent should be preserved, and that they should not become prejudicial to the kingdom.

The doctrine of Cypres, which has led to decisions that have very justly been pronounced strange by Lord Eldon and Judge Story, evidently was a principle recognized in the English law at a very early period. In the very able opinion of Judge Baldwin on the will of Sarah Zane, he considers that the statute, *de terris templarium*, 17 Edward, 2, established and ordained as a principle of the law of England, that lands once given to a charitable use should remain for charitable purposes forever. Certain it is, that the words of that statute, viz. "*ita semper, quod pia et celeberrima voluntas donatorum teneatur et expleatur et perpetua sanctissime perseveret*," afforded a rule which Lord Coke speaks of with approbation in several of his reports. The doctrine of Cypres, or something very similar to it, was there recognized. The original charitable purpose failed by the suppression of the order, and yet the lands were preserved to a charitable use. The order of templars, as we learn from the history of that period, were established at an early day for the purpose of watching the roads leading to the city of Jerusalem, and protecting pilgrims. Their numbers increased, and legacies were annually left to them from every part of Christendom, so that they became rich and powerful. As a measure of expediency and justice, the order was suppressed. In those times of violence, when but little regard was paid to individual rights, we should expect to have seen their possessions seized upon and appropriated to satisfy the rapacity of the powers who then ruled. But the pope, who suppressed the order, thought proper that their property should still be preserved for the purposes for which it was given, and determined to transfer it to the knight's hospitals, and

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published an ordinance to that effect. The king, Edward II., asserted his own rights and that of his subjects to the possession, and suspended the execution of the ordinance. He consulted the judges, who determined that all the possessions of the templars had reverted as escheats to the lords of the fee. But an act of parliament was passed, assigning them to the hospitalers for purposes similar to those for which they had originally been bestowed on the templars. It is very evident, that a power was here exercised of appointing a charitable donation to a new and similar purpose, on the ceasing of the one to which it was devoted in the first place. The judges of the court determined that the land reverted to the lords, and yet because it had been appropriated to a charitable use, it was considered that it should still continue appropriated to such purposes.

On the suppression of the monasteries in the reign of Henry VIII, such parts of the lands as had been given to *good, virtuous and godly* uses, and been misapplied, were directed to be continued to such uses.

A great object of the statute of Edward I. b. c, ch. 14, in dissolving these chapels, chauntries, &c. was, to *convert the funds* from the uses then considered superstitious, to good and godly uses, as erecting grammar schools, &c. educating youth, &c. It evidently appears to have been a fundamental principle on this subject, that where property had once been given to and used for a charitable purpose, the intent of the donor should be respected and preserved; and where, from reasons of state, it could not be observed in the particular manner by him pointed out, it should be done in such a manner as that it should be preserved for a charitable use.

Now it is of no consequence here to discuss the propriety of this principle, or to inquire whether it was at all times correctly and faithfully observed, so long as we find the principles of the law of charitable uses there existing and acted upon before the statute of Elizabeth was made. In the two instances mentioned, the legacies had been given to the templars, the lands, &c. had been given to the monasteries, the original testators and donors had been long deceased, and they intended to part with their interest in the property bequeathed. Possibly no injustice was done in not permitting this property to revert to the remote heirs and kindred of the donors, and if it had been faithfully applied to new and useful objects, it could not have been a subject of much complaint. Of this, however, we at this age cannot judge with any accuracy.

It has been confidently argued, that this statute of Elizabeth made certain gifts to charitable uses valid, which were not valid before; that it has given effect to certain conveyances, which were void before. This opinion is undoubtedly sanctioned by great authority. The language made use of in the early reports gives a strong countenance to this idea. There are, however, not wanting the opinions of eminent judges and chancellors, that the statute introduced "no new law upon this subject, and made none valid, not valid before."

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It is to be remarked, that the statute does not seem to contemplate giving effect to any charitable donations, not good before, it recognizes them as existing, and as not having been employed according to the intent of the donors. It adopts the terms which had previously been used to set apart property for such purposes, "*limited, appointed, and assigned*;" the same words which were used in the statute of Edward, VI. c., chapter 14, "all lands, &c. given, assigned, limited, or appointed," &c. and the same which are used in conveyances for the purposes of declaring, or in the appropriate words, limiting, appointing, the use for which property is conveyed.

Although it must be acknowledged that the court of chancery went very great lengths in declaring certain wills good as appointments, and although they make use of the terms, "utterly void," yet it was not by virtue of any provisions of the statute that these were declared to be good, but rather because those conveyances should have been held good as appointments before the statute, that they were decreed. Thus in Griffith Flood case, a devise to a corporation was prohibited by the statute of Mortmain, yet the devise was good as a limitation or appointment to a use, to be relieved under the statute, not because it was made valid by the statute, but because it should have been considered good as a limitation or appointment, whether made before or after. Collison's case was of the same kind. The devise was made before the statute of wills, and as a *devise of the land* was inoperative; but as a declaration or appointment to a charitable use, it was valid, and had the devise been to the use of an individual, it would have been equally good. Although lands could not be devised, yet uses were considered in some respects as chattels, and as such devisable. Chugleigh case, 1 Coke, 121. In the statute of 27 Henry 8, ch. 10, made to remedy abuses, it was recited that the hereditaments of the realm were conveyed without solemn livery by last wills, sometimes by bare words, and sometimes by signs in great extrem-

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ities. That the courts went very great lengths in the application of these words, "limited and appointed," both to conveyances and devises, in order to extend the relief given by the statute of Elizabeth, is very apparent; and some of the cases are not to be reconciled either by the law, as existing before, or declared by that statute; although, undoubtedly, some of these devises might be considered as good upon the ground already mentioned. As late as the year 1707, it was claimed that a will without any witnesses, might be good as an appointment to a charitable use, and the cases above mentioned were relied on as authorities for the position, and the Lord Keeper took time to consider before he decided against it.—2 Ver. 597. Lord Eldon, who had bestowed more attention upon the subject of charitable uses than any other chancellor, and who had at different times reviewed all the decisions made on the subject from the earliest period, in one of the last cases which came before him, and in which he reviewed the several decisions reported in Hobart's as well as Revett's case, *Platt vs. St. Johns College, Smith vs. Stowell* was pressed with the difficulty in considering that the statute of Elizabeth had a retrospective effect in divesting estates already vested. "How," says he, "does the statute make good what was in itself good for nothing either before or after the passing of the statute. Can such a construction be put upon the words which occur in this act as will authorize us to infer that they meant void gifts, limitations, assignments, and appointments?" He came to the conclusion, that it was not clear that these instruments, originally void, were held to be valid by the effect of the statute of Elizabeth, but that there was in the court a jurisdiction to render effective an imperfect conveyance for charitable purposes; that the statute had been construed with reference to such the supposed jurisdiction of the court; so that it was not by the effect of 43d Elizabeth alone, but by the operation of that statute on a supposed antecedent jurisdiction in the court, that void devises to charitable purposes were sustained.—*Attorney General vs. The Skinner's Company*, 2 Russell, 407. The above case was upon the effect of a will made anterior to the statute, and although the chancellor does not express his opinion with decision, yet with Lord Eldon a doubt expressed upon a subject contrary to the common received opinion was equivalent to a declaration of his opinion and a decision. It is very evident from the whole case, that he considered the idea which had been advanced, that the statute of Elizabeth had a retrospective operation and made good conveyances wholly void before, was destitute of any foundation.

It appears to me, from the examination which I have been enabled to bestow upon the subject, that the law in relation to charitable uses is not founded on any statute, but that it existed at the common law, the elements of which were derived from the civil law, and the principles of it may be found both in the statutes and in the adjudicated cases, long before the reign of Elizabeth.

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The origin of the jurisdiction which has been assumed over these charitable uses by the court of chancery may be a subject of more doubt. On the one side, it has been declared that this jurisdiction originated and was wholly derived from that statute; and on the other, that it belongs to the ordinary judicial equity jurisdiction of the court of chancery; and as was remarked before, there is great weight of authority for either position. The subject itself would seem naturally to belong to the jurisdiction of a court of chancery. If the law was known and established in England, as we have already considered, the remedy for the purpose of carrying it into effect could alone be administered either in that court, or a court having equity powers. Chancery always had cognizance of uses and trusts, and it was only in that court that the execution of a use, which was binding on the conscience of the trustees, could be decreed. The courts at common law had no means to compel the execution of a trust. If the estate was granted upon *condition* to perform a trust, it was forfeited, if the condition was not performed, and the land reverted, as in Porter's case, before referred to. If the land was granted upon *trust and confidence*, to perform a use, as in the case of *Martindale vs. Martin*, Cro. Eliz. 288, it did not revert on the non-performance of the trust.

Why should there ever have been a distinction in the remedy to enforce the performance of a trust or use, between those which were limited and appointed to an individual, and those appointed to a charitable use, recognized by the law? The same reason why chancery should take jurisdiction of the one, would require that they should take jurisdiction of the other. Judge Story, in 3 Peters, hazards a conjecture, that Porter's case having established a charitable use, not superstitious, to be good at law, chancery in analogy to other trusts, held the feoffees to uses accountable in equity for their due execution, and that the inconveniences felt caused the statute of Elizabeth to be passed within seven or eight years. But if we are correct in the position, that charitable uses were good long before Porter's case was decided, and some as vague and indefinite as the one mentioned to have been reported by Bendlow, in 5 and 6 Edward, VI. as a feoffment to the use of poor people, and in

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Plowden, 521, 542, there is no great hazard in believing that chancery, in analogy to other trusts, held the trustees accountable in equity, and compelled their execution whenever the subject came properly before them in court. In my view, it can make no difference when this jurisdiction was first exercised, whether it was assumed or usurped under the statute of Elizabeth or before. It properly belongs to a court of chancery, who are to exercise it so as to give effect to the intent of the donors, where it can be done consistently with the rules which prevail in a court of equity. I think, however, it will be found that this jurisdiction was exercised by chancery long before. It is true, but few cases can be found on this subject before 43 Elizabeth, nor are there many cases in chancery reported for some years after, and until the reign of Charles II. There are some cases collected by Tothil in the reign of James I. and Charles I. and some cases collected in Duke, Charitable Uses. The origin of jurisdiction in England is only a subject of speculative inquiry. Their courts possess and exercise the jurisdiction, and have by their reported decisions established a regular and orderly system of law upon the subject, and it is of very little importance to them whether it was derived from that statute or not. Here it is of more importance to ascertain where the jurisdiction was first exercised in courts of chancery; if in those states where the statute has not been adopted, courts of chancery are precluded from taking cognizance of this subject. Before coming to such a conclusion, we ought to be well convinced that it is a clear and decided point.

The idea that the jurisdiction of the court of chancery, upon informations for establishing charities, arose since the statute of Elizabeth, and that prior to the time of Lord Ellesmere, who was made Lord Keeper in 1596, and Lord Chancellor in 1603, there were no such informations—was first suggested by the Earl of Roslyn, then Lord Loughboro', in the year 1798, in the case of the *Attorney General vs. Bower*, (3 Vesey, 726) and I am not aware that it has been suggested by any other chancellor in England. Judge Story attributes this suggestion to Lord Eldon, who was not created chancellor until some years after. The result of Lord Eldon's researches, evidently led him to a different conclusion, as we may learn from his remarks in *Moggridge vs. Thackwell*, (7 Ves. 69) and in *Attorney General vs. The Skinner Company*, (2 Russel, before mentioned). Lord Thurlow considered that the cases had proceeded upon notions adopted from the civil law, which was favorable to charities, that legacies given to public uses, not ascer-

tained, should be applied to some proper object. Lord Keeper Henley says, that the uniform rule has been, both before and after the statute of Elizabeth, for the court of chancery to aid a defective conveyance to such charitable uses, where the person had power to convey.—1 W. B. 90. The same case is reported in Eden, who was a connexion of the Lord Keeper. And there is no reason to believe either that he was mistaken, or that his language is incorrectly reported.

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Lord Macclesfield, in the case of *Eyre vs. Countess of Shaftsbury*, (2 Pere. Wm. 119) declares, that it was every day's practice, antecedent to the statute of Elizabeth, to file informations in chancery in the attorney General's name, for the establishment of charities.

Lord Redesdale, in the case of *Attorney General vs. The Mayor of Dublin*, (1 Bligh. Parl. Rep. 347-8) is very full and explicit upon this subject: He asserts, that not only the law, with respect to charitable uses, was the same before as after the statute;—that the jurisdiction given to commissioners, was a new ancillary jurisdiction;—that an information by the attorney general might be brought before, and the controlling jurisdiction of the chancellor over the subject, existed before the passing of the statute;—that it was found the commission of charitable uses was not the best remedy, and they resorted again to proceedings, by way of information in the name of the attorney general.

So far, therefore, as we can learn the opinion of the chancellors in England, with but one exception, they attribute both the law on the subject of such uses, as well as the jurisdiction of the court of chancery, to a period more remote than the reign of Elizabeth. It is to be remembered, that there is excepted from the operation of the statute, a very considerable amount of property bestowed for such purposes. The act was not to extend to any colleges within the universities, or to the colleges of Eton, Westminster, or Winchester; nor to any cities or towns corporate, where there is a special governor of such lands, &c., and it may with propriety be inquired, why should a more liberal rule be introduced with regard to the enumerated indefinite cases, and the excepted cases remain subject to a more rigid system? Who was to exercise jurisdiction over them? Or were the charitable donations or legacies excepted, to be left as they would be in this country, if chancery has no jurisdiction over them, without protection, and no remedy had for abuse or misapplication of the funds?

From the case of the *Attorney General vs. Matthews*, (2 Lev.

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167) we leard, that charities not within the statute, were enforced in chancery, on the information of the attorney general. The devise there, was for the *good of poor people forever*. The commissioners had made an order thereon, which the chancellor quashed, because it being a general charity, the commissioners had nothing to do with it; but it was to be determined in the court of chancery, on the information of the attorney general, which he directed to be brought, and on the information made a decree.

In the case of *Attorney General vs. Newman*, the court declared, that the king, as *pater patriæ*, may inform for any public benefit, for charitable uses, before the statute.—Cas. in Chan. 157.

From the case of *The Poor of the Parish of St. Dunston vs. Beauchamp*, (Cas. in Chan. 193) we learn, that resort was had to a court of chancery, who made a decree, in a case where it was doubted whether the order of the commissioners would be complied with;—that the bill was filed in the name of the indefinite object of a charity, viz, the poor of the parish; and that a decree was made by the chancellor, on an original bill; and though the reporter adds a quere whether such a bill was necessary, the case shows that no doubt was entertained as to the jurisdiction and power of the court.

In the case of *Pember vs. The Inhabitants of Kingston*, on the question whether money given to maintain a preaching minister be a charitable use, the Lord Keeper and the Judges decreed, notwithstanding it is not warranted by the statute to be a charitable use, that the same should be paid by the executor, to such maintenance—Tothil, 96.

Other cases might be mentioned, where charities, not within the statute, have been enforced. We shall find also, that there are cases antecedent to the statute of Elizabeth, where the court of chancery exercised jurisdiction, and enforced charities, by their equity jurisdiction. It appears to me that all that is necessary on this point, is to ascertain whether there are any cases of this kind prior to the statute; for if there are any such, it establishes the fact, that chancery exercised jurisdiction, and shows that it was neither given by, assumed, or usurped under that statute. Nor is it material to find any one case of their exercising a jurisdiction over vague or indefinite charities. The question is, did the court take jurisdiction under the common judicial equity powers? If they did, they must enforce them according to the nature of the subject. If there was no trustee, the court could appoint a trustee; as no trust is suffered to fail for want of a trustee. If the objects were indefi-

nite, so by far the greater part of the objects of all charitable be-quests are. Who were to be benefitted by the establishing of chapels and chauntries?—who, by the establishment of hospitals?—who, by the establishment of an institution for the sustenance of impotent men and women—men out of their wits—poor parishioners—for the relief of the poor and needy, &c.? If the court of chancery had power to enforce any charities, they must have been charities of this description; for most of them are of this description.

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In the few cases before the statute, which are to be found in Duke, Charitable Uses, we find not only the jurisdiction of the chancellor established, but we find also the elements, or the principles of the system of law, upon this subject, which have been incorrectly attributed to this statute. It is to be observed, that this book contains the readings of Sir Francis Moore, who penned the statute, and who was undoubtedly well acquainted both with the law on this subject, and also with the jurisdiction exercised, both before and after the statute. As this book is not in any of the libraries in this quarter, it may be proper to recite some of the cases which are there mentioned. We find in page 131, "If a man bequeath £800 to three parishes, equally to be let out at £5 per £100 by the church wardens of each parish, this legacy is not within this statute, but yet the chancellor may give remedy by equity in chancery. If a man devise that the executors or administrators of his wife shall pay £100 to be lent out to young tradesmen, this devise is void, because he cannot charge the executors or administrators of his wife. But if that wife take another husband, and he hath assets in his hands of the goods of the former husband, those shall be liable to the charitable use; and these observations were made upon a decree in *John Howard's* case, 40th of Elizabeth."

In page 155—"If the use were limited for a chaplain, they may decree by addition, that the chaplain shall be a preacher, so they may appoint the nomination of him to a man of science, as a master of a college, &c., because such things concur in decency and order with the intent of the founder, upon a decree made 40th of Elizabeth."

In page 163—"One Simons, an Alderman of Winchester, sold certain lands to Sir Thomas Fleming, now Lord Chief Justice, then Recorder of that town, and this upon confidence to perform a charitable use, which the said Simons declared, by his last will, that Sir Thomas Fleming should perform. The bargain was never enrolled, and yet the Lord Chancellor decreed that the heir should sell the land, to be disposed of according to the limitation of

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the use ; and this decree was made the 24th of Queen Elizabeth, before the Statute of Charitable Uses ; and this decree was made upon ordinary and judicial equity in chancery, and therefore it seems the commissioners upon this statute may decree as much in a like case."

In page 154—"In the 11th of King Henry VI. a gift was made to the intent to find a chaplain *ad divina celebranda*, until the feoffor, or his heirs, should procure a foundation, &c. There was no employment until the third year of King Edward VI. ; and therefore, in the Queen's time, one Payne purchased the land as a concealment. After a commission being awarded upon this statute, the commissioners inquired and found the gift, and thereupon decreed the property to another, from Payne ; but afterwards this decree was made void by the Lord Chancellor, because the use limited to find a chaplain *ad divina celebranda* was no use within the statute. But the chancellor, by his chancery authority, may, and did decree the land to the first use."

In a late case reported, (1 Mylne & Keene, 376) *Att'y Gen. vs. The Master of Brentwood School*, we learn that a decree was made in chancery, in the 12th year of the reign of Queen Elizabeth, before the statute of charitable uses, at the suit of the inhabitants of the parish of Southweald, against the heir at law, that he should execute a conveyance for the purpose of providing a maintenance of a school-master and poor people, according to the intent of Sir Anthony Brown, as expressed in his will. The Master of the Rolls, Sir John Leach, expresses himself very decidedly on the subject of that decree, "That at that time, no *legal* devise could be made to a corporation for a charitable use, yet lands so devised were in equity bound by a trust, which a court of equity would then execute."

These cases are certainly sufficient to convince us, that the subject of charitable uses was before the court of chancery, and that decrees were made, by virtue of the chancery authority of the chancellor, and upon his ordinary judicial equity in chancery. It has already been remarked, that there are no reports of cases in chancery before that period. It has been said, that although there are many cases cited in Porter's case, yet they were all decided at law, and none in equity. But when we consider the hostility which existed about that time, between the court of law and equity, it is not a matter of astonishment that no reference should be had to the proceedings of chancery, in discussing a subject or question of pure law, even if the subject had frequently been discussed in the courts

of chancery. It is very doubtful, however, whether the subject had *very often* been before the courts either of law or equity. When we remember the spirit of the age preceding, and at the time of the reformation, and until some time after Queen Elizabeth was seated on the throne, it is not probable that there were many cases brought before any of the judicial tribunals. Until the time of Henry VIII. the charities were mostly of a religious character, or intimately connected with the religious or superstitious notions which then prevailed, as has already been noticed. It is not probable that up to this time there was much disposition to divert property, given or bequeathed to pious uses, to any other purpose, however wantonly or extravagantly they may have been expended. The right appropriation of that kind of property, was so intimately connected with the religious duties enjoined and performed, that the fear of ecclesiastical censures, which carried more terror than the process of a court of law, probably prevented many misapplications of the property sequestered for such uses; and if the trusts were abused or misapplied by the ecclesiastical bodies who had the management, the chancellor was usually selected from that class of persons; and there were no courts who had either disposition or firmness to resist the religious influence exercised by the clergy. After the commencement of the reformation, other causes operated to prevent any legal investigation of this subject. Free schools were erected principally in the reign of Edward VI. and in the beginning of the reign of Queen Elizabeth, intended and supposed to promote the progress of the reformation, and hostile to the interest and feeling of that part of the people who adhered to the ancient faith. After the death of Edward VI. and during the reign of Queen Mary, and we may add for the first years of Queen Elizabeth, it was uncertain what faith would be adopted as the religion of the state.—It was undoubtedly supposed, and expected by many, that the possessions of the monasteries, chapels, &c. which had been suppressed by Henry and Edward, would be restored. The tendency of this state of things, was evidently to cause a laxity in the administration of the law in enforcing the charities of that age, and a consequent abuse and mismanagement of the funds. The trustees, either from fear or avarice, may have felt a disposition to convert the property devoted to public uses, to their own private uses.

In the reign of Henry VIII., Edward VI., and Elizabeth, there would be no disposition to enforce those charities which had been given to promote the interest of the Roman Catholic faith; and in the reign of Queen Mary, there would be an utter aversion

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to favor those schools, which had evidently been founded to destroy the faith which she professed to uphold. It is therefore not a subject of wonder if devises and grants to charitable and pious uses were regarded with no favorable eye,—that they should have been suffered to remain dormant, without any attempt to enforce them, either in the courts of law or chancery, or in parliament, from the time of the commencement of the reformation, until it was fully settled, as was the case of the devise which gave rise to *Porter's* case, in 1 Coke, and in the case of the *Thetford School*, which originated the case of *Gibbons* against *Maltyard*, in Popham, and *Martidale vs. Martin*, in Croke.

When the statute of Elizabeth was passed, the times probably were such, as to call for a more thorough and searching remedy than had before been had,—to call for an investigation and inquisition in every county and in every diocese. The alms and hospitalities which had been received through the monasteries, had ceased, and there evidently was a general disposition to misapply the funds and abuse the trusts given and created for those purposes.—Hence the statute of Elizabeth was passed, designed, undoubtedly, to be directory to the chancellor, recognizing that the property given for purposes strictly charitable, had been misapplied, (for it is to be remembered that none of the charities recognized in that statute were of a religious character, except one, viz: for repairs of churches,) authorizing him to award a commission to the bishop of every several diocese, to inquire into all abuses or breaches of trust, &c. and to make order concerning the same. The time had come when they could distinguish between such gifts as were proper to be enforced in the then state of the kingdom, and such as were not; and the statute was passed accordingly. The proceedings under the statute, however, ceased with the necessity which required its passage. Relief, by original bill, was granted at an early day. An appeal was allowed to the House of Lords, and before the passing of the statute of 52d Geo. III. chap. 101, giving a more speedy remedy, the proceedings under the statute had ceased.

The case of the *Thetford School* so fully illustrates that there was no adequate remedy at law, and also that at law, charitable uses were recognized, and where the remedy was, that a short history of the case may not be inappropriate. It is reported in Popham, 6, 7 & 8, by the name of *Gibbons vs. Maltyard & Martin*, in Moore, 594, by the name of *Gibbons vs. Maltyard*, and in Croke Eliz. 288, by the name of *Martidale vs. Martin*:

"In 1566, Sir Nicholas Fulmerston made a will. This Sir Nicholas Fulmerston was probably the same person to whom the revenue and site of a monastery was given, on their dissolution, in the reign of Henry VIII. as he bears the same name, and the dissolution was within 30 years previous. In this will, he devised to his executors certain lands for the term of ten years, on condition that they should find a preacher forever, to preach in the church of St. Mary's four times in the year, at ten shillings for every sermon ;—that they should erect a free grammar school, and maintain a master and usher, and assure three tenements for the residence of the master, usher, and their successors forever, and for the habitation of four poor people. The remainder in the said lands, he devised to Sir Edward Clark and his wife, who was daughter and heir of Sir Nicholas Fulmerston—*on condition*, that they should, within said ten years, assure lands and tenements in possession, of the value of £35 per annum to the executors aforesaid, or their survivors, for and towards the maintenance of the said preacher, schoolmaster and usher, and for the relief of the poor persons aforesaid ; and if the said Edward Clark and his wife, should make default, he then devised that the estate of the said Clark and his wife should cease in said land, and then the said lands, upon such default, should go to his executors before mentioned, or the survivors of them, *upon trust and confidence*, that they or the survivors of them, should yearly dispose of the rents and profits, in finding the preacher and other charitable works aforesaid."

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It would appear from the case, as reported in Popham, that both the executors and Sir Edward Clark were unwilling to carry the will into effect, and probably combined to defeat the same ; for we learn, that the executors refused to be executors, and that Sir Edward Clark entered and attempted to assure other land of the value of £35 per annum, with a condition, wholly different from that prescribed in the will. The son of the surviving executor commenced an action of ejectment against the person in possession, under the heirs of Sir Edward Clark, who was also heir of Sir Nicholas Fulmerston. We find that Sir Edward Clark claimed the land on the ground that the condition was against law ; and if he failed on this point, he then claimed that the executor held the same land on condition ; and as they had failed to comply, he, in right of his wife, as heir of Sir Nicholas Fulmerston, was lawfully possessed of the land. It appears however from the case, as reported in Popham, Moore and Croke, that it was decided that though the executors had refused the trust, they should still take the land as devisees ; and it was further decided, that the use declared in the will, was not prohibited as a superstitious use, being in favor of learning and relief of the poor, and secondly that the

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devise to the executors, on the default of said Edward Clark and wife, was not upon condition, for the devise being upon *trust and confidence*, showed that the testator reposed *trust and confidence* in them, and would not have the land returned for non-performance of it. Nothing is said how this trust was to be enforced, nor is it suggested that there was no way to enforce it. The courts of law could proceed no further, as between the heir and devise, they determined that the devisee, as trustee, was entitled to hold the land. The land having been thus decided to be in the devisee on trust, we do not learn what steps were then taken to compel the trustees to perform the trust. But from what we can learn of the subsequent proceedings, we find there was still a disposition to frustrate the charitable intent of the devisor, by withholding a part of the yearly value of the lands; for it seems that afterwards, the case was both in chancery and in parliament, where we learn from Duke, "breaches of trust were to be relieved, although it was a tedious and chargeable remedy." The lands devised increased in value, from £35 to £100. A private bill was exhibited in parliament in the 7th Jac. I. It was referred to the justices of the court, who adjudged that nothing should be converted by the devisees to their own use, but that the whole should go for works of piety and charity, and should be employed in performance and increase of the said works of charity.—8 Coke, 259.

This case, which evidently attracted some notice at the time, had also been in chancery; for in the preface to Duke, by Bridgeman, he says, "As early as in the year 1610, in the famous case of *Thetford School*, it was determined, that where a testator pointed out the particular objects of his bounty, the *court of chancery* will construe his intent imperative, to be not only in exclusion of his next of kin, but to the disinheriting his heir at law. Proceeding upon this principle, the *court* uniformly decrees the surplus rents and profits to the augmentation of the charities." And he adds, "The same doctrine has prevailed in courts of equity to this day." In the history of this case, we see, that devises to a charitable use, were known in the courts of law,—that the court recognized them as good, so far as to determine that the estate should belong to the trustees for such uses; and that the trustees were not permitted to baffle the intent of the devisor, or appropriate the property to their own uses; and that both in chancery and parliament, the intent of the devisor could be, and was carried into effect; and that without any aid or benefit from the statute of Elizabeth. But it may be asked, if the law in relation to these uses,

existed before the statute was incorporated into their law, and the courts of equity had jurisdiction, what was the necessity of passing the statute? This question has been in some measure anticipated, viz. that it was to furnish a more effectual, searching, and less expensive remedy. This was distinctly asserted by the counsel in argument, of the case of *Attorney General vs. Dixie*, 13 Vesey, 522, and not denied.

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That the proceeding in chancery was tedious and expensive, we learn from the case of *Hynshaw and others vs. Morpeth*, (Corporation Duke, 242). The corporation refused to apply the increased value of certain lands, given for a charitable purpose, for the purposes designated, and refused to appear before the commissioners, claiming that they were visitors, and by the proviso of the statute, exempt from the power of the commissioners. The Lord Keeper declared, that as they were trustees as well as visitors, they were not within the intent of the proviso, declaring, "that if it was otherwise construed, this breach of trust would escape unpunished, unless in *chancery* or in parliament, which would be a *tedious and chargeable* suit to poor persons." The heavy expenses attending at that time a suit in chancery, we may conjecture, when we are told, that it had been customary to give presents to the chancellors, the amount of which, as disclosed in the trial of Lord Bacon, was great and extensive. Further, about this time, the contests between courts of law and the chancery was at its height, and suitors, particularly such as were benefited by the charitable donations mentioned, would apply to a court of equity with some reluctance, as it was but a few years from this time that indictments were preferred against the suitors, solicitors, and a master in chancery, for questioning in the court of chancery, a judgment obtained on the king's bench. Furthermore, the practice of the court of chancery was not at this time reduced to much system—the office of chancellor having been filled indiscriminately, as we are told, by lawyers, churchmen, and courtiers. The jurisdiction over a considerable part of the charities then existing, had been given to other tribunals—some to the court of wards and liveries. The lands of the suppressed abbeys and monasteries were placed in the hands of commissioners, under the superintendence of the courts of augmentation of the king's revenue, and it was customary at that time to proceed in cases similar by commissioners. The statute of 13th Edward I. provided, that if lands, given for free alms and relief of the poor, were not employed for that purpose for two years, the lands should revert to the donor, and he might have a writ of *cessavit*, which was un-

BENNINGTON, doubtedly effectual as to all that class of charities. To furnish a better remedy, one that should extend to every diocese and every county—that should be attended with comparatively a small expense and charge, and of which any could avail themselves by petition, without being subject to the expense of a suit in equity, or without being subject to cost, unless they objected to the proceedings of the commissioners, were undoubtedly reasons sufficient for passing that statute. But whether they are satisfactory or not, is but of little importance, if it is found that the elements of the law of charity were recognized in the courts of England, and the court of chancery exercised a control over charitable uses before. That there has always been a disposition in England to favor devises and legacies of this character, is not to be denied. The very early decision mentioned by Plowden, (523) where the courts of law upheld a devise to St. Andrews Church in Holborn, by construing it as a devise to the Parson, who was *persona capax*, evinced this disposition. The whole course of their decisions since, has been in accordance with this idea; and where they have considered a charitable use declared in a will good, and have supplied any defect which existed in the will, for the purpose of upholding the use, they have only acted in analogy to their proceedings in other cases. It is a familiar principle, that this court will aid a defective conveyance. The cases where this subject has come before the courts in this country, are numerous. The law, in relation to charitable uses, is recognized in many of our sister states. And it is alone upon this principle, that many of their decisions can be supported.

The case of *The Baptist Association* against *Hart's Executors*, (4 Wheaton, 1) though it was truly a question of local law, arising under a statute of Virginia, repealing in terms the statute of Elizabeth, and which was undoubtedly intended to abolish the law of charitable uses in that state, yet it must be admitted, was decided on general principles, applicable to all the states where that statute is not in force. To avoid coming in collision with the decision in that case, the courts have been somewhat astute in endeavoring to make distinctions between that and the case before them. In the case of *Terrill vs. Taylor*, before mentioned, which was before this decision, the law upon the subject of charitable uses was recognized. The case of *Ingliss vs. Sailor's Snug Harbor*, (3 Peters.) it appears to me, can only be supported on the principles of the law of charitable uses. It is placed on the ground of an executory devise by one of the Judges, but according to the case of the *Baptist Association*, the devise was void for want of a person to take,

and the estate descended to the heirs, and no courts in this country have ever admitted, that property once vested, can be divested.

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Judge Johnson, who concurred in the decree in the last case, considered the law in relation to charities, as existing in the state of New-York. Two of the Judges, viz. the Chief Justice and Judge Story, considered the case of the *Baptist Association* as governing the case before them, and dissented. The case of *Beatty et al. vs. Kurtz et al.* (2 Peters. 566) was also a recognition of the doctrine, applicable to public and charitable uses. The conveyance, which was the subject of that suit, as the court say, if valid, must have been considered as valid upon other principles than those which ordinarily apply between grantor and grantee.—The law in such cases, in the language of Judge Thompson, (6 Peters. 435) applies to those rules adapted to the nature and circumstances of the case. In delivering the opinion of the court, Judge Story says, that the bill of rights in Maryland, recognizes to a certain extent, the statute of Elizabeth, under which such conveyances would be upheld, although there was no specific grantee or trustee. As to which I may remark, that if the clause in the bill of rights in Maryland, which is rather an exception or recognition of the previous validity of such appropriations, (for it is found in an excepting clause to an article in the bill of rights which makes void all gifts for the support of religious teachers, or for the benefit of any religious sect or denomination) is considered as recognizing the statute of Elizabeth, there is much stronger reason for asserting that the clause in the 41st article of the constitution of this state, before referred to, not only recognizes the doctrine of charitable uses, but the law on that subject, as established by the judicial tribunals in England, and all the principles of the law, not repugnant to the constitution of this state. We are not disposed however to say, that that statute is in force here, although there is not wanting a very high authority for the position.

The case of *Beatty vs. Kurtz*, is considered by one of my brethren, as distinguishable from the case under consideration, on the ground that each member of the Lutheran society is to be considered as having an interest in the land conveyed. The court, however, do not lay any stress upon that circumstance, in the decision, nor was it urged in the argument.

The case of *The City of Cincinnati vs. The Lessee of White*, recognizes the law in relation to dedications of lands to charitable uses, which are admitted to be void, without any grantee. The subject has been fully and ably investigated in New-York, and we

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Bennington have the authority of the case of *The Trustees of New Rochelle*, (2 John. Chan. Rep. 992) and the opinion of Chancellor Jones, in the case of *Orphan Asylum against McCarter*, (9 Cowan, 440) in favor of charitable bequests, and the jurisdiction of chancery over them.

In Pennsylvania, the case of *McGirr against Aaron*, (1 Penn. 51) and *Witman vs. Lex*, (17 Sarg. & Rawle, 91) recognize the law as existing in that state. The very full and able opinion of Judge Baldwin in the circuit court in that district, on the will of Sarah Zane, where he collects and examines with great industry and ability, all the law, statute and common, with the several decisions there, which, if it is entitled to any consideration as an authority, establishes legacies, so very similar to the legacies in the will under consideration, is conclusive upon the subject.

In Massachusetts, we have the case of *Bartlett and others vs. King's Ex'rs*, (12 Mass. 537) where a bequest to a pious and charitable use was sustained similar to the bequest in this will, in trust for a society similarly organized and constituted, to the societies who are the objects of Mr. Burr's bounty, the case being in no otherwise distinguished from this, except that the trustees were named.

There is also the recent case of *Emery vs. Gowing*, of which we have a manuscript copy, where the statute of Elizabeth is considered as in force in that state.

In Connecticut, we find a legacy to be disposed of among the brothers and sisters of the deceased, as the executors should judge most in need of the same, according to their best discretion, was held not void for uncertainty, and the executor having deceased, a committee or trustee was appointed to execute the trust.—8 Conn. 51, *Bull vs. Bull*.

In New Jersey, in the case of *Hendrickson vs. Hicks*, the doctrine of charitable uses was recognized.

In North Carolina, in the case of *Griffin vs. Graham*, (Hawk. 97) after a full and elaborate investigation, it was held, that the statute of Elizabeth was in force in that state. That independent of the statute, and though the jurisdiction of the court of chancery in England over charities should be considered as belonging to the court, not as a court of equity, but as administering the prerogatives of the crown, yet the court of equity in that state had the like jurisdiction; and that where there were trustees, and a definite trust, and specific objects pointed out, the court would, as a matter

of trust, take cognizance of the same, by virtue of its ordinary jurisdiction, as a court of equity.

In this state, in the case of *Stone Executor of Fuller vs. Griffin*, (3 Vt, Rep. 400) a church or society incorporated, was held to be capable of receiving the use of property, devised to trustees for their benefit. In all these cases, it is apparent, that the courts have endeavored to uphold donations for public, pious, or charitable uses, and to get over all critical, technical exceptions against them, probably thinking that they were part of the *voluntary system* adopted in this country, for the support of pious, religious, and charitable institutions and associations, and in which we are distinguished from those countries where religion is sustained by force of law, and by extensive church establishments. The weight of authority in the American courts, is evidently in favor of the law of charitable uses, and the jurisdiction of courts of equity over them.

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The jurisdiction exercised in these cases, is different from the specially delegated jurisdiction which the chancellor exercises over idiots and lunatics, and over general charities and the visitatorial power over eleemosynary corporations, which is exercised on petition. Where there is a general charity, as a devise to pious and charitable uses, the king may dispose of it; and the course is, to apply to the king by petition for a sign manual.—*Ambler*, 712.

A court of chancery, as such, has no jurisdiction to remove the officers of a corporation, but where the crown become visitors for want of an heir of the founder, and the removal of the officers is sought, it is by petition to the great seal. This jurisdiction is like that exercised over idiots and lunatics by the chancellors, as the representatives of the king. It is a proceeding before the chancellor, and not in the court of chancery, as was said by the Master of the Rolls.—*Ex parte, Dann*, 9 Vesey, 547.

The proceedings in charity cases are usually before the court of chancery, under their general equity jurisdiction. In the case of a petition to the chancellor, no costs are taxed. On bill or information in the court of chancery, costs are allowed. It is to be remembered, that this distinction has been made, that where there is a bequest to trustees, for charitable purposes, the disposition is made by a court of chancery, and a scheme is laid before the master. Here, I apprehend, the court act on their general equity jurisdiction. But if no trust is interposed, and the disposition is to charity generally, an application must be made for a sign manual; and on this, the chancellor acts as the specially delegated officer of the crown.

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It is however, somewhat immaterial here, under what head this jurisdiction is exercised; although I have no doubt it is under the general equity jurisdiction of the court of chancery, the same which is exercised over other trusts. We have all the powers incident to a court of chancery—(Stat. 123)—our rules are to be conformed to the rules and precedents established in courts of chancery in Great Britain, so far as is consistent with our constitution and laws, and we can exercise all the jurisdiction over infants, lunatics, charities, &c. which are exercised by the chancellor or the courts of chancery in Great Britain, (except that which is delegated to other tribunals,) exercising them according to our law, and not according to their statutes. Believing that the principles and elements of the law, in relation to donations to charitable uses, was known and established in England long before the statute of Elizabeth—that gifts and grants may be made for purposes of relief to the poor, and for upholding charitable purposes, having in view the moral, intellectual, and religious improvement of the objects which are from necessity general, uncertain and indefinite—that communities and associations might be united for the purpose of receiving these donations and distributing them—that they are within the jurisdiction of a court of equity, which by its constitution and rules, is alone adapted to carry them into effect; and believing also, that the law, which has been built and established by a series of doctrines, as well as the jurisdiction, does not necessarily arise, or grow out of that statute. We believe that many, if not most of the decisions, in cases which have been before the court of chancery, are applicable to this country, and are authorities here. Nothing further will be necessary than to compare the legacies given in this will with those which have been established as valid by decided cases, and from them learn whether they are such as can and ought to be carried into effect, in the exercise of our equity jurisdiction. How many of the cases which have been decided on the doctrine of Cyprus, are incompatible with our free institutions, it is not necessary here to inquire or decide. One thing however may be confidently affirmed, there are no reasons of state, no considerations arising from an established religion, requiring us to refuse to carry into effect a bequest to a charitable use, lest it should tend to propagate a false religion.

The decision in the case of *The King vs. Lady Pertington*, (1 Salk. 162—3 do. 34) would not be considered as compatible with our free and liberal ideas on the subject of religion. A Jew might here give his property for building a synagogue, and we should not

appropriate it to building a foundling hospital, (Amb. 228). We should be loath to decide, that a devise for bringing up poor children in the Roman Catholic faith, was void ; and yet declare that it should go to such uses as others might direct, (7 Vesey, 490). But when we do find a charitable intent, and property given for any public, pious, and charitable use, tolerated among us, and we can carry it into effect in the exercise of our equitable jurisdiction, as a court of chancery, we ought to do it ; and more especially, we should hesitate about giving the property, left by a testator, to those who were not considered by him as in any way entitled to it, and disappoint his pious and charitable intention, which probably afforded him a consolation in his departing hours.

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On examining the authorities upon this subject, some of the cases will be found directly applicable to the case under consideration, and embracing almost every point raised in the argument.—These general principles have been established, which seem to rise necessarily from the nature of the subject,—that the court are to be liberal in the construction of charitable bequests, to carry into effect the intention of the testator,—that where they can discover the charitable intent, they will carry it into execution, and support the charitable purpose,—that they will not suffer an equitable interest to fail for want of a trustee to support it ; and that it has never been considered as an objection to a charitable use, because it was general and in some measure indefinite, unless there was an uncertainty as to the amount intended to be given, or the general purpose was of so uncertain and indefinite a character, that it could not be executed : the instances of which, will be mentioned.

In the case of the *Attorney General vs. Clark*, (Ambler, 422) a legacy to the poor inhabitants of St. Leonard's Shoreditch was sustained, although there were no trustees or persons to select the objects named in the will. In this case, a reference was made to the case of the *Attorney General vs. Rance*, where a legacy was given to the poor, without designating what poor. As the testator was a French refugee, it was given to the poor refugees. Similar to this was the case of *Power vs. Attorney General*, (3 Mer. 48) where a bequest to the widows and seamen of the town of Liverpool was sustained.

A bequest to the widows and orphans of the parish of Linfield was objected to, for that the description of the persons was too general and uncertain. It was held good as a gift to the poor widows, &c.—*Att'y Gen. vs. Comber*, 2 Simons & Stuart, 93.

In the case of the *Attorney General vs. Hickman*, (2 Eq. Cas.

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Abr. 193) the persons who were to relieve the objects of the charity deceased in the life-time of the testator, and yet the legacy was sustained. The use declared, was for the encouragement of such nonconforming ministers as should preach God's word in places where the people were not able to allow them a sufficient maintenance. The testator left the disposition of this charity to persons who died in his life-time. The Chancellor Lord King, said the charity which was the substance of the devise, remained, notwithstanding the death of the trustees, and could be administered by the court, as well as if the legatee was alive.

The case of *Waller vs. Childs*, (Ambler, 524) is very similar to the present. This was a bill brought by the heir at law, against the executors and trustees, to set aside the charitable bequests.—The directions in the will were to pay to the *treasurer or treasurers, for the time being*, of a society or fund, for the maintenance and bringing up of dissenting students for the ministry of the gospel. It appears there were three denominations, viz. the Presbyterians, Independents, and Baptists—each of which had a society, consisting of persons chosen out of their congregations, called the managers of the fund, for the support of pious dissenting ministers of their denominations;—that collections were annually taken up and put into the hands of the treasurers thereof, for the time being.—This bequest was objected to as void for uncertainty. The court decided in favor of the charity, and ordered the money to be paid to all the treasurers of these denominations, upon the trusts in the will. This case, unless it was founded on the statute of Elizabeth alone, certainly covers the whole ground contended for by the different societies in this case.

The case of the *Attorney General vs. Stepney*, (10 Vesey, 22) where a bequest to the Welsh Circulating Charity School for the increase of Christian knowledge, and promoting religion, and to purchase Bibles and other religious books, pamphlets and tracts, as the trustees should devise, was held to be a good bequest, subject however to such checks as might be consistent with the religious establishment of the kingdom, but which would not be required in this country.

These cases are a very few, selected out of a great multitude, to show that the remarks of Godolphin and Swinburn, made long since, "that testaments to pious uses are not void in respect of uncertainty, as other testaments are," is still recognized as the law upon that subject. The cases where legacies have failed for uncertainty, either as to the amount intended to be given, or of the

uncertain and indefinite purpose of the charity, are none of them similar to those under consideration.

In the case of *Brown vs. Yeale*, (7 Vesey, 50) the bequest was for the purchase of such books as may have a tendency to promote the interest of virtue and religion, and happiness of mankind; and was determined to be too indefinite to be executed by the court.—The correctness of the application of the principle to that case, was however doubted by Sir William Grant and Lord Eldon, (9 Vesey, 399). A bequest “for such objects of benevolence or liberality as the Bishop should appoint,” (9 Ves. 399) “for such benevolent purposes as the executors might agree on,” (3 Mer. 7)—a bequest for such charitable or public uses, or to any person or persons, as the trustees might direct, (1 Simons & Stuart, 69) were held void, as uncertain and indefinite. In all these cases, there were no specific objects or purposes of charity—no charitable purposes designated; and as they were general and indefinite, and could not be executed, the legacies failed for uncertainty.

The distribution of charitable donations, it appears also, may be made by persons unincorporated, and who are shifting from time to time.—*Baylis and Church vs. Attorney General*, 2 Atk. 239.—The Lord Chancellor observed, that though the Alderman and Inhabitants are not in point of law a corporation, yet as the Attorney General was a party, he made a decree that the money should be disposed of as the Alderman, for the time being, and the principal inhabitants should think most beneficial.

In the application of the principles of the law, and these various decisions, which are selected from a great number, (for the subject and the authorities have been fully and ably sifted in several cases within a few years previous to the case before us) we shall find, that the legacies in the will of Mr. Burr are established beyond all controversy, if these decisions are to be recognized as authorities upon this subject in our courts. These different societies have been long known, united and associated, precisely the same as similar societies have for a long time existed for similar purposes;—not incorporated, because they are better adapted to the ends of their associations, without an act of incorporation. The objects of their association are defined and certain, and the members are generally those who contribute their funds to, and are from sentiment and duty friendly to the objects of their association. The purposes are such as have been considered as charitable by the decisions of courts of chancery and law, and have been recognized as such both before and after the statute of Elizabeth, and are more definite than

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many enumerated in Porter's case, for which lands, tenements, and hereditaments may be given, and much more so than a great portion of those which have been adjudged to be good charitable uses from the time of Edward I. to the present time. The funds are usually expended under the direction of a board of managers or directors. The due administration of them can be enforced, and the maladministration prevented or punished in a court of chancery.— If the objects of the society are such, for which money may be lawfully given, what better way could be devised to promote that object than to employ these societies, already organized and in operation, for that very purpose? If a scheme was to be submitted by a master to carry into effect the objects intended by this will, I can think of none so good as to direct the legacies to be paid to the societies already in existence. The testator having constituted these societies, or their managers and directors the almoners of his bounty, to expend the legacies for the objects contemplated in their association, this court can decree the money to the amount of the legacies to be paid them, either on the application of the state's attorney, or on the application of any of the members of the societies, in behalf of themselves and their associates. If it was a perpetual fund, the annual income of which alone was to be appropriated, the court would find some way to perpetuate the fund, and apply the income. The societies in this case, are to receive and distribute the legacies, according to the intention of the testator, for the purposes of their association. They receive nothing for their own benefit or their own individual use. The individual persons, who are to be ultimately benefited, are of course undefined and unknown. The managers of the Bible Society, of the Domestic Missionary Society, the Colonization Society, and the Tract Society, are sufficiently described, according to the case of *Bartlett vs. King*, (12 Mass.) and the objects as fully pointed out as in the case of *Attorney General vs. Stepney*, (10 Vesey) or *Attorney General vs. Comber*. They are competent to expend this property, which is not given as a perpetual fund, but for immediate distribution, responsible both in conscience and law for their fidelity in executing their trust.

Having the view already expressed, of the law, of the jurisdiction of the court, and the nature of these legacies, we must of course come to the conclusion, that if there was a devise of real estate, directly to these societies, or the annual income of the estate was devised to them, we should decree a sale, if necessary, and the proceeds paid over, or substitute a trustee to support the fee. It be-

ing however a devise of money not for the purpose of a perpetual fund, I can see no objection in decreeing the money to be paid to the one who ordinarily receives and keeps the funds of these societies, or to the treasurer for the time being, whoever he may be, as was done in the case of *Waller vs. Child*. But inasmuch as the testator has directed that the legacies should be paid to the treasurers of the societies for the time being, whose receipts are to be a sufficient discharge, the court have considered that whoever was designated to that office or appointment, on the death of the testator, is the person or trustee to whom the legacies are to be paid, and who is capable of receiving the legacies as they become due, for the use and benefit of these societies, to be disposed of by them for the objects contemplated in their associations, agreeable to the intent of the testator, and the solicitor may draw a decree agreeable to the minutes herewith furnished.

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In this result, I am authorized to say, that a majority of the court concur.

MATTOCKS, Chancellor, *dissenting*.—The amount of property involved in this case has elicited much industry in the preparation and great talent in the argument. The case has been several times argued, but the court have never been so fortunate as to come near unanimity; and upon its decision, the minority not being a solitary individual, it relieves me, as I agree with the learned judge who has dissented, from going into the case in detail, which indeed, from the great learning which the counsel have displayed, would be quite above my ability. Yet the importance of the question, and the fear that the precedent may lead to dangerous consequences, and having left the court before the decision was pronounced, induces me to record some of the reasons of my dissent, without pretending to discuss the whole subject. For it may happen that a judge as well as a juror may feel that it is his duty to resist the conclusion which has been ingeniously urged upon him, without having learning enough to detect all the errors in the process.

Among the points presented in writing by one of the able counsel for the societies, at the last term, were the following.

“9th. In the case of a charitable use, like other trusts, there must be a legal estate to support it.

“10th. The testator has vested the legal estate in these money legacies in question, subject to the charitable use, in the treasurer for the time being, viz: the time when the legacy is to vest.”

The ninth proposition, although it has not, I believe, been re-

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peated by the gentleman this term, I regard as the frank admission of a good lawyer, made from a conviction that it was undeniable, and which satisfied me of its truth.

The tenth being an adverse proposition, required to be proved; and if that is made out, the generous advocate has lost nothing by the ninth. On this tenth point, in my view, hangs all the law and the equity that should govern the case; for if the property was vested in the societies, or their treasurers, it should be decreed to them, and if necessary, they should be protected in the enjoyment of it, by expending it in works of piety and charity, according to the benevolent intentions of the associations. If not, the residuary legatees are fairly entitled to it for their benefit, according to the undisputed powers of the court of chancery relating to legacies and trusts.

I am satisfied, from the arguments and authorities cited, that no legal estate passed by will to the societies or the treasurers, nor any individuals who have been or will be treasurers; and as I understand that to be the opinion of a majority of the court, I am not a dissentient on this point, and therefore it is not my province to state the grounds of this opinion.

The arguments that are the most strongly urged at this term are, that it is within the power and is the duty of this court, as a court of chancery, to sustain these bequests as appointments to pious and charitable uses, if they are not supported by the law;—that we are warranted in doing this by the civil law as adopted by the English courts of chancery before the statute of Elizabeth, or at all events after;—and that the spirit of the statute has descended to us, and if absolutely necessary, the statute itself.

Lord Mansfield, it has been said, would resort to the civil law when straightened. The Roman law, in its day, was wise and potent; but when the numerous popish clergy who followed William the conqueror, and engrossed all the offices in the realm, being ignorant of the laws of England, introduced the civil law, and intermixed it with their own canon law, it was seen to be favorable only to the monkish clergy, who were delighted with it, but it was universally resisted by the nobility and laity. But the pope, with his enthroned archbishops and installed bishops, was an overmatch for the nation, and in the fourth reign from the conquest, fastened these laws upon them, together with an appeal to the court of Rome, as a part of the common law; and it is remarkable that at the reformation, in lieu of abolishing the canon law, the statute of 25 Henry VIII. established it when not repugnant to the law

of the land or the king's prerogative, until a new canon law should be made, which not being done by the 1st Elizabeth, that statute was revived and confirmed; and there having been no canon law of the land before the popish, and none having been substituted since the reformation, it seems the protestant episcopal church in England is still governed by the canons of the mother church. But the civil law, save such part as has become canon, has not been established by act of parliament, and if it had, with the same exceptions, ("when not repugnant to the law of the land,") would not affect the construction of wills, upon which the common law is not silent, and to the courts of which the chancellor himself often resorts for aid. The civil law, as such, has no force in England, except from usage in some particular cases, and in some particular courts, where they have adopted the civil law doctrine of charities. Roberts on Fraud, 353, in note 125, says, "By the civil, and more particularly by the canon law, certain preferences and indulgencies were allowed to the *testamenta ad pias causas*. But it does not appear that our law makes any distinction in favor of a will for the benefit of a charity. Thus if a devise be made to A and his heirs, and if A die without heirs, to a charity, such devise over is void, as it would be in case of common persons; and no favorable construction will take place to give effect to such devise over, such as would be made, if it were to a person related in blood, so as to be capable of becoming the heir at law, from an implication of intention, founded upon the impossibility that the first devisee should die without heirs, while the ulterior devisee was living, by restricting the sense of the word 'heirs' to heirs of the body." He cites Cro. Car. 57, *The Attorney General vs. Gill*. This last case was an information by the attorney general to establish a charity, and the lord chancellor said—"As to what is said, that the devise of the remainder ought to be supported as given to a charity, supposing it void if given to a common person, so shall it be also when given to a charity;" and adds, that "heirs" shall not be construed to mean heirs of the body, where the devise over is not inheritable, and quotes many authorities; thus making blood a greater favorite of the law than charity even.

The same note adds, "and on a deficiency of assets, legacies to a charity will abate in proportion of others," and cites two cases 1 P. Wms. and adds, "But nevertheless, our courts of law or equity will not enjoin the spiritual court from proceeding in lega-

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tory matters according to the civil law.—*Fielding vs. Bond*, 1 Vern. 230." In *Masters vs. Masters*, 1 P. Wms. 422, the master of the rolls says, "that the charities, though preferred by the civil law, ought to abate in proportion, for they were but legacies." In *Attorney General vs. Hudson*, the lord chancellor said that all the legacies, as well to charities as others, should abate in proportion, for though the Roman law preferred a pious or charitable legacy to others, ours does not; and in a note it is said, "But the spiritual court give a preference to charity legacies, and lord North would not enjoin them." This shows that there is yet a conflict of laws in the different courts as to charitable uses; and this single note is some evidence to my mind, that the general understanding of the profession there is, that the common law will not violate its own settled principles in favor of a charity which may not always be just; for what a charity gains, some one or more must lose; and it is not because our ancestors thought less of piety and charity, but because they respected more the certain and sure tenure of property and the tranquil succession of the offspring to that of their ancestors, that they guarded more against the caprice of testators.

Much creditable research and acumen have been shown in endeavoring to make out that the courts of chancery, by their common and ordinary jurisdiction, independent of the statute of Elizabeth and of the prerogative, have sustained defective, and at law, void bequests to charities, &c. Duke on Charitable Uses, with the readings of Sir Francis Moore upon the statute of charitable uses, which it is said to be suspected had escaped the attention of the supreme court of the United States and of lord Loughborough, and which is so rare in America that its only fellow is in the library of some (I suppose inaccessible) antiquarian society, has been imported for the occasion. As great judges and chancellors have differed on this topic, it was a fit subject of forensic criticism, but to me it appears, that if there has been some few such decisions, they were made by [confounding the civil and canon law, the previous statutes, and the prerogative together, with the superstitions of the times, and has become as obsolete as the book which contains them, and which, it seems, is not known at the capital and scarcely at Westminster Hall, and should now be regarded rather as buoys to deter than beacons to invite. Many of the cases in Duke show that wretched work was made with charitable uses, some, if not all, under the statute. A few will be transcribed as a specimen. Page 386—"A wife having power to dispose of her personal estate, which only comprehended what she had before

marriage, got afterwards into the possession of a large personal estate, in a private manner, upon the death of her father, and concealing the same from her husband, disposed thereof to charities. Held that what was so concealed from the husband shall not be made good to him, so as to disappoint the charities." Page 390—"A devise to trustees for the benefit of a charity, the trustees died in the life-time of the testator, though it be a lapsed legacy in law, it is subsisting in equity." Page 401—Lord Hardwick says, "This is a different kind of charity from those pretended ones in the times of popery and monkery." Page 360—"An inscription on the donor's tomb-stone, declaring the donor's gift to a charitable use, was found in *hæc verba*, and a decree thereupon accordingly, and is a very good precedent." This inscription was the posthumous offspring by another father. Sir Francis Moore's readings, Duke, p. 128—"It was decided, that, in case of will by a popish recusant to students in divinity did not mean poor priests, for that was no charity, but superstition." Page 124—"Religion being variable, according to the pleasure of succeeding princes, that which at one time is held for orthodoxy, may at another be accounted superstitious, and then such lands are confiscated. Therefore, a gift of lands to maintain a chaplain or minister, to celebrate divine service, is neither within the letter nor spirit of the statute Elizabeth." Page 125—"To find bows and arrows for poor children of a poor man is good, because it is an ease to the fathers who are bound to find them." And to complete the list of unjust and ridiculous decisions, it was gravely adjudged. It is said, though it is not in Duke, that where an Israelite left money to build a synagogue, that was superstitious; but as the Jew evidently had a charitable intent, the money should be laid out to build a lying-in hospital. Shall we now assume the power that was there exercised, whether it was ordinary or extraordinary—whether it was the spirit of the statute of charitable uses, or the domination of the clergy, who had acquired much of the landed property of the kingdom, and the bishop being the orphan's court, denied their right to personal property, and gave it to strangers in charity at pleasure, until the statute of distributions, or any other cause which occasioned these odious decisions? I think not, so far as I know, until this case arose, no one in this state ever dreamed of such a chancery power.

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As to the statute of Elizabeth being in force here, that has latterly, with great discussion, been abandoned in the argument. The 41st section of the constitution of Vermont, has been urged as authorizing the court to extend the protection claimed to these socie-

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ties. But the latter clause, which says, "under such regulation as the general assembly of this state shall direct," evidently gives this power to that body. They can enact a statute of charitable uses, in addition to what they have done for them. Granting the power to them, is not granting it to us; but is virtually saying, if it means this protection, that we have it not, and is in favor of the other side, who have also quoted it. If it means other protection and encouragement, it has nothing to do with this case. It is also contended that the statute of Elizabeth, or the spirit of it, has been introduced into most of the states: In some of the old states, it has been so considered, it seems.

The Pennsylvania case, reported in the pamphlet produced, in which Judge Baldwin displays so much learning, was decided on the ground that the Quaker societies "must be considered as a body politic or corporate by presumption—as possessing and enjoying the right of succession, with the same rights of property, as natural persons do by inheritance." That aided the cause. The balance of the opinion is what has been called *sloping over*.

In New-York, Chancellor Kent says, it was unsettled when he wrote; notwithstanding Chancellor Jones' opinion, I do not understand that the glebe rights in Vermont are held upon any chancery or charitable use principle, but upon the common principles of grants—the fee to vest in the Parson, when inducted like one. And the New-Hampshire grants to the first settled minister, like a devise to the future children of A." But if it were so, the decision of the supreme court of the United States, in which this state, by granting away these lands to common schools, had made itself a party, would hardly be adopted as the local common law. But after all, suppose it were granted that all the English courts of chancery have and do consider that the system of churches is established, and that by these ordinary powers, they can support bequests defective at law, is it applicable to our government and community? Is it called for by the wants of religion, virtue, or literature? For upon the question of making a precedent, and not following one already made, these are proper enquiries.

In England, for many centuries, bequests to corporations and to pious and charitable uses, by various acts of parliament and decisions of the courts, have been alternately encouraged and discouraged, as different notions prevailed, until the laws and usages had become very much involved: when, by the 9th of Geo. II., the final mortmain act was passed, which did not, like Henry VIII., seize upon the property of the church, or the charities; but effec-

tually guarded against all death-bed importunities, as to worldly matters, and perhaps was intended among other things to remind opulent persons that deeds of charity, like the work of repentance, should not be put off to the last. This act has now existed for an hundred years, save one. Some part of it, at least, of enlightened jurisprudence and of vital piety, has been commended by many wise men, and condemned by none, so far as I know. And the present century, so far as christian benevolence can be shown by not withholding the sinews of its warfare, has been a time of unparalleled generosity. For the Protestants of that realm have poured out their money for pious uses, as freely as the martyrs of old did their blood; and to their example we are probably indebted for much of the same spirit, which has been manifested in this country. And shall we now introduce a system here, which has been exploded there without any apparent injury, and which probably has produced great benefits? I do not mean to intimate that a mortmain act is required in this state. Our early marriages, and the love of progeny, of which most men have sufficient, and the general prudence and discretion of ministers and other pious men, during last sicknesses, have prevented, and is sufficient to prevent the danger of improper influences. And on the other hand, the simplicity and ease of making valid bequests to charity, which is generally less difficult than disposing legally, as is intended, of an estate, among a large family, requires no special indulgence for carelessness or mistakes. But let it remain as it has remained; and let him who deems it duty to leave his property to the public in lieu of his relatives, take the trouble to see that he does it according to law: For if he has well considered the subject, he has time and opportunity to do so: And if it is a sudden thought that suggests itself, or that is suggested to him at too late a period to do this, its propriety may be dubious, and let his property take the course of nature, which generally will do very well. But a strong objection in my mind against assuming the power, is the great difficulty in deciding what shall be a charitable use. In many cases like the present, there could be no doubt; but in others less clear, there would be many doubts. In the list collected by Judge Baldwin, in Sarah Zane's case, of statute and adjudged cases, to be valid on as pious and charitable, before the statute of 43d Elizabeth, is forty-six; and those embraced by the statute, twenty-one.—These include various public matters that would not at this day and in this country be called pious or charitable, but rather strict legal duties, if any, as “cleaning the streets,” “the maintenance of

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pier-walls and sea-banks," "maintaining the poor in houses of correction," "for repairing roads and bridges," "fitting out soldiers' and other taxes." In applying these statutes or decisions, or the spirit of them, as we are urged to do, it would be necessary either to consider charitable uses to extend to every use that is not private, or it will devolve on the court to decide what objects should be considered as pious or charitable; for it is evident that the courts of England have not considered, like *Domat*, that "since legacies for works of piety and charity have a double favor, both that of their motive for holy and pious purposes, and that of their utility for the public good, they are considered as being privileged in the intentions of the law." For the public objects which I have quoted, stand upon the same footing as those that are public and pious, such as "the endowment of a vicar to inform the people;" and it would not be contended, it is supposed, that a bequest to a railroad or steamboat, would be to a pious or charitable use, so as to entitle it to more favor than a legacy to a child, or other relation. Of course the court of chancery here must without the aid of the statute of Elizabeth, as to designating the objects, beyond the letter or spirit of which, the English chancellors, since its passage, have never extended their charitable construction, and to that extent, with regret, decided what are objects of piety and charity, that ought to be favored and treated with more benignity in equity, than they are viewed in the austere courts of the law.

And Sir Francis Moore has said, that religion is variable according to the pleasure of succeeding princes. It might happen, that piety and charity, about the modes and forms of which good men disagree, would vary with succeeding chancellors, and with the excitement and fluctuations of the times and topics that engage the attention of the public. The difficulties are not the common ones which all courts have to encounter, of distinguishing cases, and applying some known rule or principle to the one in hand; or if the case is new, the best analogous principle, and which there is sometimes perplexity in doing, but can generally be effected with tolerable correctness; because most honest men are agreed, in the main, about what is just. But the difficulty in the cases in question is intrinsic; for all things that are lawful, are not commendable; and what is commendable at one time, is not at another, from mere change of public sentiment. Only twenty years ago, a distiller was deemed a useful citizen;—he promoted home manufactures, which tended to make us independent of other nations.—Now he is a man-slayer, because he makes liquid poison. Yet

the business is as lawful now as then ; and upon a question of right, would be as well protected ; but upon a question of favor, it would be otherwise. There has been no such change of opinion as to fraud, accidents and trusts, always the proper subjects of chancery.

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But suppose we were now to make a list of uses that are to be especially protected, and therefore encouraged as bequests to pious and charitable uses, or which may be the same test, suppose any or all the societies of this and the neighboring states should claim to have a defective bequest, supported under favor—to say nothing of masonic societies, as that question has become political—how would it be with colonization and anti-slavery societies, which regard themselves as the antipodes to each other ? are they both commendable ? and if not, are we to say which, if either is ? Or suppose an endowment of a free school for blacks in the state should, or should not be favored ; or the establishment of a Shaking Quaker station, or to the Mormons, or to establish a Jesuit College, or a Nunnery, or a Synagogue : These are all lawful, and equally protected, with other religious and charitable societies, by the constitution and the laws, and would receive equal justice at our hands. But in the matter of favor, as being pious and charitable uses, to say “no” to any of them, would be invidious—to say “yes” to them all, would be a tremendous stretch to the conscience of an orthodox chancellor. Nothing but the express warrant of the legislature would induce me to handle these exciting questions, some of which there is already danger may affect the tranquility of the nation. And to assume or to use the undefined and undefinable judicial discretion, which has been urged upon us, will compel us or our successors to entertain these and other similar questions whenever they arise.

Finally, although I most cordially approve of the objects of all these societies, having been for a long time an unworthy member of some of them, or their branches, and happen to be of the same faith with the testator, and of the religious societies that he intended so liberally to patronize. Yet I cannot but believe, with due submission, that the cause should have been decided the other way.

WINDSOR COUNTY.

FEBRUARY TERM, 1835.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*

| | | | |
|---|---|-------------------|------------------------------|
| " | " | STEPHEN ROYCE, | } <i>Assistant Justices.</i> |
| " | " | SAMUEL S. PHELPS, | |
| " | " | JACOB COLLAMER, | |

DAVID BROWN *vs.* JOSHUA MARSH.

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A release to one of two joint *tort feassors*, is equivalent to a satisfaction, and enures to the benefit of both.

The declaration in this cause was as follows :

In a plea of the case, for that heretofore, to wit, on the 23d day of October, A. D. 1830, at Landgrove, in the county of Bennington, the defendant combined and conspired with one Jabez Temple, Jr. to cheat and defraud such persons as they might be able to deceive, by the false and deceitful arts and practices of them, the said Marsh and Temple, as herein after set forth—the said Temple being then and there wholly bankrupt, insolvent and irresponsible, as was then and there well known to said Marsh, it was then and there wickedly and fraudulently contrived and agreed by and between the said Marsh and Temple, that said Marsh should furnish and deliver to said Temple, from time to time, certain large sums of money, and that said Temple should go out among those to whom his insolvency was unknown, and there, by aid of said money, and the credit thereby obtained, procure on credit such property as he might be able, making only such payments in part, with such money, as would procure such property on a credit, and then to return such property so procured to said Marsh, who was to receive the same, and keep and dispose thereof as his own, under the feigned pretence of a purchase thereof from said Temple ; and they, the said Marsh and Temple, to divide the gains and avail thereof, leaving the persons from whom said property was obtained, unsatisfied

and unpaid. And the plaintiff avers, that in pursuance of said fraudulent and deceitful confederacy, the said Marsh did, on the day and year last aforesaid, at said Landgrove, furnish and deliver to said Temple a large sum of money, to wit, the sum of one hundred dollars, for the purpose aforesaid, with which money the said Temple, on the same day, came to Springfield, in the county of Windsor, and there, by virtue of the credit obtained by said money, did buy, procure and obtain, on credit, from divers persons to whom the insolvency of said Temple was unknown, divers quantities of goods and chattels, and among others, did buy and obtain from the plaintiff, to whom the insolvency of the said Temple was unknown, by said means, on credit, a large quantity of sole-leather, to wit, three hundred pounds, of great value, to wit, of the value of twenty-five dollars, all which leather the said Temple, in pursuance of said confederacy, on the day and year aforesaid, immediately conveyed to said Landgrove, and then and there delivered to said Marsh, who then and there received and held the same as his own, under the feigned pretence of having purchased the same of said Temple—he, the said Marsh, then and there well knowing the same to have been fraudulently procured as aforesaid; and the plaintiff avers that he remains wholly unpaid for said leather—all which is to the damage, &c.

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EXCEPTIONS.

This case came on to be tried on the general issue joined therein.

The plaintiff, to maintain the said issue on his part, offered the said Jabez Temple, Jr. in the plaintiff's declaration named as having conspired with the said defendant, as a witness.

The counsel for the defendant objected to the admission of Temple to testify in the case, on the ground of his being interested in the event of the cause.

Whereupon, Temple produced a release, executed to him by the plaintiff, under his hand and seal, in the words and figures following, to wit:

“Know all men by these presents, That I, David Brown, of Springfield, in the county of Windsor, and state of Vermont, for and in consideration of one dollar, paid to my full satisfaction before the ensealing hereof, by Jabez Temple, Jr. of Londonderry, in the county of Windham, and state of Vermont, have remised, released and discharged, and by these presents do remise, release and forever discharge the said Jabez Temple, Jr., his heirs, executors and administrators, of and from all, and all manner of action

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and actions, cause and causes of action, suits, debts, dues, sum and sums of money, liabilities, amounts, covenants, notes of hand, bonds, bills, contracts, agreements, promises, damages, claims and demands, whatsoever, in law or in equity, which, against the said Jabez Temple, Jr. I ever had, now have, or which I, my heirs, executors or administrators can, shall, or may have, for, upon, or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the date hereof.

In witness whereof, I hereunto set my hand seal, this 24th day of November, A. D. 1834. DAVID BROWN. (Seal.)

In presence of

DAVID WHITNEY,
EDMUND DURRIN."

Whereupon, the plaintiff moved to have the said Temple sworn as a witness for the plaintiff in said cause, and he was sworn accordingly.

The defendant then moved the court for leave to file a notice, that under the general issue joined therein, he should offer in evidence the said release, as discharging not only the said Temple, but releasing also his cause of action against the defendant.

Leave was granted.

The counsel for the defendant then insisted that the said release did discharge and release not only the interest of the said Temple, but did also release and discharge the plaintiff's cause of action against the defendant, and requested the court so to charge the jury.

But the court refused so to instruct the jury, and did instruct the said jury that the said release could not avail the defendant as a discharge of the cause of action.

Exceptions made by the defendant, and allowed.

There was in this cause a motion in arrest made by the defendant, which was overruled; to which decision the defendant likewise excepted.

Mr. Marsh and Mr. Williams for defendant.—The case presents this question: Is the release of Temple, set forth in the bill of exceptions, a release of the plaintiff's cause of action, and consequently of this suit?

The release acknowledges satisfaction of all demands, "by reason of any matter, cause or thing whatever." It is, therefore, a release of one *tortfeasor* in this cause, and consequently a discharge of all implicated.

Thus, "If divers commit a trespass, though this be joint and several at the election of him to whom the wrong is done, yet if he

releases to one of them, all are discharged, because his own deed shall be taken most strongly against himself. Also such release is a satisfaction in law, which is equal to a satisfaction in fact. But he, who would take advantage of such a release, must have the same to produce."—5 Bac. Abr. 702.

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"Also if two men doe a trespasse to another, who releases to one of them all actions personalls, and notwithstanding sutch an action of trespasse against the other, the defendant may wel shew that the trespasse was done by him and by another, his fellow, and that the plaintife, by his deed, (which he sheweth forth) released to his fellow all actions personalls, and demanded the judgment, &c. and yet sade deed belongeth to his fellow and not to him. But because hee may have advantage by the deed, if hee will shew the deed to the court, hee may wel plead this," &c.—Coke Lit. 232.

The doctrine laid down in Bacon and Coke, seems to have been universally acknowledged, and there seems to have been yielded to it a general acquiescence. It has become so well known, that in relation to trespass, every one understands that a settlement with one of several trespassers, discharges all, and the community have generally come to practise upon it.

But with respect to the release of persons jointly liable, it is not to trespassers only that the doctrine applies. When the satisfaction goes to the wrong or injury done, or to the release of any one of several joint, or joint and several obligors, its effect is to discharge the cause of action, and to release the debt for which the several are holden. Thus it is said by the supreme judicial court of Massachusetts, "The authorities are perfectly clear that a release to one joint and several obligor discharges both. The reason is, that there is but one debt or duty, and that being once received by the obligee, he can have no further claim; and if he discharge the one upon receiving a part, or something else in lieu of the debt, or if he be satisfied so as to release one, the debt itself must be considered discharged."—*Tuckerman et al. vs. Newball*, 17 Mass. 581, 584.

Where a release is made to operate directly on the demand or cause of action between the plaintiff and defendant, if it discharge any one who is liable to such demand, it must of course discharge all who are holden for such demand; and if it do not discharge the cause of action, and all who are liable, it does not release the witness.

Suppose the release had been pleaded in bar, what answer could have been made to it? If the plaintiff had replied that he meant

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to release Temple only, or that he had received no consideration but a nominal one, the release would have been demurrable.

In *Cuyler vs. Cuyler*, it was held that a covenant never to sue A on a note against A & B, inasmuch as it operates as a release to A, was a release of the note.—2 John. Rep. 186.

In *Harrison vs. Wilcox et al.* the plaintiff had accepted a certain sum of one of the signers of the note, and agreed to look to the other for the balance. This was a *nudum pactum*; but the court agreed that if a release, by deed, had been executed to one, it would have discharged the note.—2 John. Rep. 448, 450. See also *Seymour vs. Minturn*, 17 John. Rep. 174.

In *Rowley vs. Stoddard*, the plaintiff received an hundred dollars in part payment of one of the defendants, and gave a receipt in full, and afterwards sued both. It was decided that this receipt of a part could not release the whole, but that a technical release would have discharged the demand.—7 John. Rep. 207. 5 East. 230. 9 Wendell, 336.

So a release by one of several plaintiffs to the defendant, in consideration of six cents received, is a complete discharge of a personal action.—13 John. R. 286, *Austin vs. Hall*.

In all the cases where a release has been supposed to be proper, in order to discharge a witness, the interest to be released has been a collateral interest, and not a direct interest of the witness in the matter in controversy.

As in *Peirce vs. Butler*, the maker of a note may be released by the endorsee, and become a witness in an action between such endorser and his endorsee.—14 Mass. 303.

So in *Turner vs. Austin*, the defendant who was sued as sheriff, for the default of his deputy, may release the deputy, and call him as a witness; because his interest is collateral, he being liable to the defendant only, and not to the plaintiff. But in such case, a release by the plaintiff to the deputy, would have released the sheriff also.—16 Mass. Rep. 181-5.

So an heir to an intestate may release his interest in the estate, and become a witness in a suit in favor of the administrator, on receiving an indemnity from costs.—*Boynton vs. Turner*, 13 Mass. Rep. 391.

In *Woods' Adm'r vs. Williams' Adm'r*, the plaintiff was administrator of Mrs. Thomas. The estate was going to her husband, David Thomas, who, on executing a release to Woods, was admitted as a witness.—9 John. R. 123.

It is believed that no case can be found in which the plain-

tiff has been allowed to release the matter in controversy to a witness, or any one else, and yet been permitted to recover.

In *Buckley vs. Dayton*, John Bowker, who was collaterally holden to the plaintiff, but not directly in the same form of action, was released and made a witness.—14 John. R. 387-8.

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Judge Hutchinson and Mr. Coolidge for plaintiff.—The first question is, whether a discharge of a witness, who was co-swindler with the defendant, said discharge under seal, naming a consideration of one dollar, discharges the defendant.

It is so common that discharges are given in cases similar in principle, and the actions thereby supported and not defeated, we can hardly believe, while preparing our briefs, that the defendant's counsel will seriously contend, that this discharge of the witness should discharge the action. It discharges the interest of the witness, but makes no compensation to the plaintiff.

However, we present two or three cases, where it was in vain urged, that a receipt to one, neither defendant nor witness, formed a defence; and several cases where the witnesses were discharged by the plaintiff, and yet the plaintiff recovered.

In the 3d of John. Rep. 175, *Wilson and Gibbs vs. Reed*, a release given by the plaintiffs to the sheriff, who took and sold the goods, urged as a defence to the action brought against the purchaser at the sheriff's sale. And it was decided to be no defence.—Similar in principle is 7 John. Rep. 207, *Rowley vs. Stoddard and Stoddard*.

In 1 Camp. Rep. 251, *Miller vs. Falconer*, the plaintiff discharged his servant who was driving the cart when the injury was received, and the plaintiff had a verdict.

In 2 Camp. 200, *Wright vs. Wardle*, this suit was brought to recover of the defendant for goods furnished to Mrs. Mary Anne Clark, and she was offered as a witness to prove the defendant's liability. She was objected to. The plaintiff executed a release to her and her husband. She testified, and the plaintiff obtained a verdict.

In 14 John. Rep. 387, *Bulkly and Wheeler vs. Dayton et al.* the plaintiffs, or rather one of them, released John Bowker from all claims against him and one of the defendants, Reynolds, but not the demands against the other defendants. He was admitted. This action was assumpsit, and the defendants contended, that Bowker and Reynolds might be liable, but that the others were not.

In 11 Mass. Rep. 27, *Stackpole vs. Arnold*, this suit was up-

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on several notes signed by Z. Cook ; and he was called as a witness to prove, that he acted as agent for the defendant. The plaintiff released him from the notes. He was admitted and testified. In all these latter cases, no person seemed to suspect that the discharges from the plaintiffs to the witnesses would operate to discharge the actions.

7 Wend. Rep. 229, *W. & A. Moore vs. Tracy*, is an authority to show, that Temple was a competent witness, without a discharge ; and also to show, that the declaration discloses a good cause of action against the defendant.

That the declaration is sufficient, we cite 3 John. Rep. 235, *Allison vs. Matkien*, where trover was maintained on a state of facts very similar to those disclosed in this declaration.—See 7 Wendell.

Compare this with an action for an injury to an individual from a nuisance in the highway.—See Wills Rep. 71, *Chichester vs. Lethbridge*.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The important question in this case is, as to the effect of a release, executed by the plaintiff to Jabez Temple, Jr. which is set forth in the bill of exceptions. The motion in arrest has not been much relied on : no authority is read in support of it. Such actions have been frequently brought, and the case of *Moore* against *Tracy*, 7 Wendell, 229, shows that in a neighboring state they are recognized. We are not disposed to decide that such an action cannot be maintained. On the trial, it appears, that Jabez Temple, Jr, was offered as a witness : No question was made to the court whether he is admissible without a release. The release set forth was then executed and delivered to him. The cases in which witnesses have been released, are usually those, where they have, or are supposed to have, a collateral interest, which may be affected by the event of the trial. A discharge of such interest, in no way operates upon the cause of action. But where a witness cannot be discharged without discharging the action, or cause of action itself, a party must make out his case as well as he can, without the benefit of the testimony of such witness. The release executed in this case, was very full and ample, discharging all, and all manner of actions, or causes of actions, damages, claims or demands whatsoever. This being under seal, imports a consideration ; and is, as to Temple, a full, complete, and ample discharge of every claim or action, which the plaintiff had

against him. A release is considered as a satisfaction in law, and equivalent to a satisfaction in fact.—5 Bac. 762. A release to one of two joint debtors, or to one of two or more joint trespassers, is a release to both, upon the principle of its being a satisfaction ; and herein it differs from a covenant not to sue one of two or more joint debtors, which is not to operate as a discharge to the others. A covenant not to sue a sole debtor or trespasser, is considered as equivalent to a discharge, to avoid circuitry.

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On examining the declaration in this case, it appears that the defendant is charged with conspiring with Temple to defraud such persons as they might be able to deceive. Temple being wholly irresponsible, Marsh, the defendant, was to furnish him with money ;—that Temple, by aid of the money and credit thereby obtained, should procure property on credit, on his own responsibility, and that Marsh and Temple were to divide the gains and avails thereof. It is obvious that a combination between the two is charged, and if proved, both the witness and the defendant were liable, and might be sued as joint *tort feasers*.

The cause of action was complete against both or either ; and a satisfaction received of one, would discharge the other. The effect of the release was to discharge the cause of action in favor of the plaintiff against the two, and must therefore enure to the benefit of either of them.

The judgment of the county court is therefore reversed, and a new trial granted.

TOWN OF PLYMOUTH vs. TOWN OF WINDSOR.

If a woman, having no settlement in this state, pregnant with a bastard child, is procured by the overseers of the poor of the town where she resides, to go into another town to be delivered, and is there delivered—*Held*, That the child is considered as born in the town from which she is so procured to depart.

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On the trial of this cause, which was appealed from an order of removal, the counsel for Plymouth gave evidence to the jury tending to prove, that Sally Winn, the pauper in question, was the bastard child of one Hannah Goodlip, a single woman, who, for about three years before the birth of said bastard, and to within about one month of her delivery of said child, lived in Windsor ;—that the said Hannah had previously lived with her mother in the town of Bridgewater, in the county of Windsor, from

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the age of eight years until within about four years previous to the birth of said pauper; and that the said Hannah went from said Bridgewater to the town of Hartland in said county, and there resided about one year next before she went to reside in said Windsor, as before stated;—that while the said Hannah was big with child, Messrs. Hunter and Hoisington, who were then two of the selectmen and overseers of the poor of said Windsor, applied to Joel Lull, who was then constable of said Windsor, and told him that the said Hannah was likely or about to be delivered of a bastard, and that he must see that she was removed out of town.

The counsel for Plymouth gave the evidence of *one* witness only; that the said Lull called on the said Hannah, and told her that she must leave town;—that the said Hannah expressed a desire to remain in said Windsor during her approaching lying-in, and that the said Lull told her that the selectmen would not allow of it.

But the counsel for Plymouth also gave the evidence of the said Lull, the only other witness on this point, that when he called on the said Hannah to convey her out of town, in pursuance of the said request of said selectmen, the said Hannah expressed a wish to him that he would carry her to said Bridgewater; and told him that her mother lived there;—that the said Lull thereupon carried the said Hannah to her mother's in said Bridgewater—the said mother then being the wife of one Bassett, who was not an overseer of the poor of said Bridgewater.

The counsel for Plymouth also gave evidence tending to prove, that the said Hannah was delivered of said bastard, the pauper, at said Bridgewater, in the month of June, 1806, about one month after the said Hannah was conveyed there by said Lull, as before stated; and that the said pauper went from said Bridgewater to said Plymouth on a visit, about three years ago, and there falling sick, became a charge upon said Plymouth, and has remained so ever since.

The counsel for Windsor gave evidence to the jury tending to prove, that the said Hannah had been duly warned to depart said town of Windsor, and had never gained a legal settlement therein.

There was no evidence in the case tending to show, nor was it contended, that the said Hannah had any legal settlement within this state at the time of her being so carried to Bridgewater, or that the said pauper had ever gained any legal settlement in her own right, unless it was by birth.

On the trial, the counsel for said town of Windsor contended, and requested the court to charge the jury.

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1. That if they found that the said pauper had not its birth in said town of Windsor, and that the said Hannah Goodlip had not a legal settlement in said town of Windsor at the time she left said Windsor and went to said Bridgewater, they should find a verdict for said town of Windsor that said pauper was unduly removed.

2. That if said Hannah Goodlip went voluntarily and of her own accord to said Bridgewater, at the time she was conveyed there by said Lull, the town of Windsor would not, in law, be liable for the support of said pauper.

3. That if the said Hunter, Hoisington and Lull did not act in pursuance of the law in assisting the said Hannah Goodlip to remove from said town of Windsor to said town of Bridgewater, their acts were not official, and would not be the acts of the town of Windsor; and as it regards the town of Windsor, would not be fraudulent in law; and

4. That upon the whole evidence, the said town of Windsor were entitled in law to a verdict of unduly removed.

But the court refused so to instruct the jury, but did instruct them, among other things, that if they found that the overseers of the poor of Windsor procured or caused the said Hannah to be carried or removed from said Windsor to said Bridgewater, when, without such procurement or conveying she would not have left said Windsor, then the said town of Windsor was liable, and the said pauper was duly removed, notwithstanding they should find that the said Hannah never had a legal settlement in said Windsor, and that she did express a wish to said Lull that he would carry her to said Bridgewater on his calling upon her to carry her out of said Windsor.

The jury found a verdict for Plymouth, that said pauper was duly removed.

The counsel for said Windsor excepted to the said decisions and charge and refusal to charge. Exceptions allowed, and the cause passed to this court for revision.

Coolidge and Edgerton for Windsor, insisted that the pauper in question is a bastard, and not having her birth in Windsor, Windsor is not chargeable for her support. The place of birth of a bastard is the place of settlement.

Marsh and Aikens for Plymouth.—The questions arising on the facts stated and found in this case, are,

1. Whether, under the circumstances attending the removal of

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Hannah Goodlip to Bridgewater, and the consequent birth of Sally Winn, the pauper, in that place, gives her a settlement there.

2. Whether Hannah Goodlip, having no settlement in Windsor, or elsewhere in this state, her surreptitious and fraudulent removal by the procurement of the overseers of Windsor, in order that her child might be born in some other place, renders it proper and legal that any town where the child may become chargeable should remove her to Windsor.

As to the first question, it is scarcely to be believed that it will be contended that the pauper gained a residence, by birth, in Bridgewater.

By the statute of 1797, first section, it was declared that every bastard child should be deemed to be settled in the place of his or her mother's last legal settlement.—Comp. Laws, 370.

This section was, however, repealed by the statute of 1801, and this statute is wholly silent as to the settlement of illegitimate children. During the time that this statute was in force, the pauper, Sally Winn, was born, under the circumstances stated in the exceptions. This last statute was repealed by the act of 1817. This act can have no bearing on the question before the court, though it again enacts that illegitimate children shall have the settlement of their mother.—Comp. Laws, 381-3.

The pauper, having been born under the operation of the act of 1801, the question must be decided on general (not to say common law) principles; and on this point we are not without authorities.

The general rule is, that illegitimate children are settled where born; but to this rule, there are several exceptions.

The first exception is, that if any fraud be used to procure the birth of a bastard child in any particular parish, such child shall be, *prima facie*, settled, not where born, but in the parish from whence its mother was fraudulently and collusively removed. This point is fully settled in the case of *Tewksbury vs. Twining*.—2 Bott's Poor Laws, 1, 2—2 Bott. 3.

So in the case of *Masters vs. Child*: If an unmarried woman with child of a bastard, and settled in one parish, is persuaded by the parish officers to go into another parish, on purpose to be there delivered, this fraud will make the parish chargeable where the mother was settled, though the child was not born there.—3 Bur. Just. 35, S. C. 3 Salk. 66.

So where a bastard is born, pending an order of removal, or in

jail, if the order be reversed, the child is not settled where born, but must follow the mother.—*Westbury vs. Cofton*, 2 Bott. 4.

And in all the cases, any fraud or collusion in procuring the birth of a bastard child to happen in one place rather than another, takes the case out of the general rule that a bastard child is settled where born.—*The King vs. Astley*, 2 Bott. 10.

As to the second question, we think it equally clear, that the pauper ought to have been sent to Windsor, where the fraud or collusion was practised, from any town where she becomes chargeable.

It is a rule that no one can take advantage of his own fraud.—Windsor is estopped from saying that the child, if the mother had not been removed to Bridgewater, might, or would have been born in some other place than Windsor.

The mother, appearing to have no settlement in this state, could not have been removed to any other town, except in the manner she was removed to Bridgewater, in which case Windsor would have been liable in the same manner as now.

We have an authority in point in this part of the case, in the case already cited of *Tewksbury vs. Twining*, in which Sir William Jones, before whom the cause was tried, is reported to have said, "Illegitimate children must be kept by the parish in which they are born; but if any improper practice appears, then this rule doth fail, and the child shall be kept and provided for by the parish where the mother was got with child, and which used the practice, to have the child born, in another parish."—2 Bott. 1, 2.

"If a woman, pregnant of a bastard, be fraudulently removed by parish officers, for the purpose of preventing the bastard from becoming chargeable to their parish, the child is settled in the parish from which the mother was so removed; but not if the mother be so fraudently removed by a parishioner liable to pay rents, not being a parish officer."—*The King vs. The Inhabitants of Mattersey*, 24 Com. Law, 49.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—In this case, it appears, 1. That the pauper was a bastard child, born within the limits of the town of Bridgewater, and has gained no settlement except by birth.

2. That her mother, at the time the pauper was born, had no settlement in this state, but for the period of three years, and until about one month before the birth of the pauper, resided in the town of Windsor, and being there pregnant, the overseers of the poor of

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Windsor procured or caused her to be removed or carried to the town of Bridgewater, when without such procurement or carrying, she would not have left Windsor. It is admitted by both parties, that the place of birth of a bastard child, was the place of its settlement, at the time this child was born. The general policy of our law has been to give bastards the settlement of their mother. The rule of the common law, which treats them strictly as *nullius filius*, has been altered by our statutes, to a certain extent at least. Thus they are capable of inheriting and transmitting an inheritance on the part of the mother. Whether from the principles of our statute, the common law has been in any way altered or changed in regard to bastard children, any further than the statutes have particularly enacted; is not a question now to be decided, as it is conceded, that at the time of the birth of this bastard, there was no law which gave them the settlement of their mother, and also that an illegitimate child was at that time settled in the place where born. Now it is an admitted principle, that if a woman pregnant with a bastard child, is by the parish officers procured to go into another parish, and there be delivered, the child gains no settlement by birth in the parish to which the mother was fraudulently removed. The law terms this procurement or practice, where done by the officer of the town, as fraudulent, and therefore inoperative. *Masters vs. Child*, 3 Salk. 66.

It is to be observed, that this principle applies only when the fraudulent removal is procured by the officers of the town or parish, to whom the duty of taking charge of the poor is committed: when done by others, it has no effect. It has been contended, that this applies only to the case where the mother is settled in the parish from which she is removed, and probably most of the cases in the reports are of this description. But it will be remembered that as to the settlement of an illegitimate child, the settlement of the mother in England is of no importance whatever. Thus if a mother resides in a parish, under a certificate, in which case she gains no settlement in the parish where she resides, and is there delivered of an illegitimate child. The child is settled where born, and where the mother resided at the time, though residing under a certificate, and though settled in another town. But further, the case read from 4 Barn. & Adolph. 211, *King vs. Maltersley*, does not recognize any distinction in the case of a fraudulent removal, whether the mother was settled in the parish from which removed or not; but lays down the principle generally, that where the mother is fraudulently removed by parish officers, the child is settled in

the parish from which the mother was so removed. And indeed it must be so from reason, as well as from authority. A residence thus attempted to be changed, for such a purpose, cannot be considered as legally changed. A woman thus removed, must be considered as still residing in the town or parish where she had resided, and where, but from the procurement, she would have continued to reside. The law does not, and cannot permit a settlement to be thus changed, or to be acquired in a parish or town, other than what it would have been, but for the improper practice of its officers. It will be remembered, that it is only where the officers of the town practice this fraud, that these consequences are visited on the town. There are other cases in which the place of birth of an illegitimate child, for the purpose of settlement, is not considered as the particular town or place where the mother is delivered.—Children of this description, born while the parent is in jail, or in a work-house, or after an order of removal, are considered as born in the place where the mother resides, or has her settlement, or to which she was about to be removed and have her residence. The jail or work-house is considered, for this purpose, as situated in every town in the county.

The case of *Tewksbury vs. Twining*, 2 Bott's Poor Laws, 1, 2, is a very clear and decisive authority on this subject, that an illegitimate child must be provided for by the parish which used the practice to have the child born in another parish. The result is, that this pauper must be considered as born in Windsor, where her mother had resided for a great number of years, and until a short period antecedent to the birth of this pauper, and where, as the jury must have found, under the charge of the court, she would have continued to reside, if the overseers of the poor of Windsor had not caused her to be removed to Bridgewater. And from the conceded principle that the place of birth of an illegitimate child was at this time the place of its settlement, the pauper had her settlement in Windsor, and was duly removed.

Judgment affirmed,

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JOSEPH A. GALLUP vs. JAIRUS JOSSELYN.

If A agrees to build a barn for B, by a stipulated time, and to take the timber on the land of B—*Held*, That the property of the timber cut and drawn for the purposes of finishing the barn, did not belong to A, so as to be taken in execution for his debts.

This was an action of trespass, for taking and carrying away a certain quantity of boards and timber.

It was admitted by the defendant that he took the property, as charged in the plaintiff's declaration.

The defendant then offered in evidence two certain writs of attachment, which were read to the jury, without objection; by virtue of which, as deputy sheriff, he took said lumber as the property of one Dan Shipley, which writs are here referred to.

The defendant then introduced evidence tending to show, that some time previous to the attachment, the plaintiff, with said Shipley, had entered into a written contract, by which the said Shipley was to build a barn upon the land of the plaintiff, with permission to use the timber upon the land of the plaintiff sufficient for that purpose; and further tending to show, that the boards and timber in question were made from timber cut and taken by said Shipley from plaintiff's land, in pursuance of said written contract;—that said Shipley went on, at his own expense, except using plaintiff's oxen as mentioned in said contract, and cut said timber—drew it to the mill—hired it sawed, and drew it from the mill on to the land of said plaintiff, at the place where it was attached by the said defendant;—that said Shipley had framed and raised said barn, and had partly completed the same, and with his hands was at work in finishing said barn at the time the property was attached;—that the timber and boards at the time of the attachment, were lying within twenty feet of said barn, for the purpose of being put on to said barn;—that the plaintiff was advising in relation to the building of said barn up to the time of the attachment, which was four or five days after the time set in said contract for completing said barn; and further, that the farm including the land upon which the said timber was lying at the time of the attachment, was occupied by Leonard Harlow, under a written lease, made a part of this case;—that at the time of taking the lease referred to, the said Harlow had agreed with and been directed by the plaintiff not to molest or hinder said Shipley in the building of said barn. And further tending to show, that when said boards and timber were attached by said Josselyn, he moved them about five or six rods into the

highway ; and that soon after, the plaintiff took back the said boards and timber, and moved the same to or near the place from which the same were removed by said Josselyn when he attached the same ; and that said Gallup having so taken back said boards and timber, put them on to his said barn. And there was no evidence tending to prove any possession of said boards and timber in the plaintiff, otherwise than as herein before stated.

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The defendant's counsel requested the court to instruct the jury that if they believed the foregoing facts, which the evidence tended to prove, the defendant was entitled to a verdict. But the court did not so instruct the jury ; but did instruct them to the contrary of this, upon both points : And the jury returned a verdict for the plaintiff. To which decisions of said court in their charge, and refusing to charge, the defendant excepted ; and his exceptions were allowed and certified.

Mr. Hutchinson and Mr. Chandler for defendant.—1. The plaintiff had no title in the timber at the time of the attachment. The title was wholly in Shipley, who was to build the barn by the job, and who had, by plaintiff's consent, changed the property from growing trees, to timber and boards. The permission to Shipley to get the timber, was a part consideration of the contract.—11 Wendell, 135, *Johnson vs. Hunt*.

2. If plaintiff had any interest in the property, he cannot maintain trespass, as he had neither the possession or right of immediate exclusive possession, but had parted with it to Shipley.—2 Pick. Rep. 122, *Walch vs. Pomroy*. 5 Vt. Rep. 100, *Braimard vs. Burton*—same, 278, *Soper vs. Sumner*—same, 331, *Hart vs. Hyde*.

3. If it should be said that Shipley's time for completing the job had expired, and therefore his right of possession ceased, it is answered, the plaintiff waived that right by continuing to advise and direct about the work.—5 Vt. Rep. 278, (above cited)

Asa Aiken, contra.—1. The contract referred to in the exceptions, is a contract for *labor*, with the finding of certain materials, not the product of the farm, with the right to use, for *that specific purpose*, the timber of the plaintiff, which he had on the farm.

2. Shipley, by the terms of the contract, acquired no right in the timber on the farm, to use it for any other purpose. If he had cut and sold it, he would have been liable *for the timber* to the plaintiff. The plaintiff's remedy for *such* a use or conversion by

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Shipley, would not have been upon the contract, but by an action *counting upon the tort*.

There was, therefore, no *sale* of the timber to Shipley. There being no sale, the timber was not Shipley's, and consequently not liable for *his* debts.

3. The *state of the materials* furnished by the plaintiff for the construction of this barn of his, cannot vary the case.

If the agreement had been to construct this barn out of timber of the plaintiff, already manufactured into beams and plank and boards, no one can pretend that an agreement to fashion them into a barn would change the property—no more can it do so, if the agreement be to build it from the raw material.

4. If Shipley cut off the timber for any *other purpose* than building the barn, he is a *trespasser*; and trespass does not change the right of property.

If he cut it for *this* purpose, he is protected in its use for this purpose, *by the licence* contained in the contract for building.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—This is an action of trespass, for a quantity of boards and timber, taken as the property of Dan Shipley. It appears that a contract was made between Shipley and plaintiff, upon the construction of which depends the rights of the parties to this suit. In the first place, Shipley was to build a barn at all events, by a time therein limited. Gallup was to find timber. There was no sale to him—no transfer of property; and he had no right to use timber for any other purpose. If he thought proper to procure it elsewhere, no right is given him to take an equivalent from Gallup's land, or in short, for any other purpose than building the barn; for such are the express words of the contract. It may be very questionable whether, if Gallup had sold the land whereon the timber grew, it would not have so far rescinded the contract, as that Shipley would have been under no obligation to fulfil. At all events, Gallup would have been liable for all damages, and if Shipley had procured the timber elsewhere, Gallup would have been under obligation to pay for the same. If the timber, either before or after it was sawed, had been burnt up, without fault as was supposed in argument, it would have been so far Gallup's loss, as that Shipley might for the same purpose had procured more from the same lot.

Such being our views of the nature of the contract, it follows that the timber, when cut from the stump, was the property of Gallup. It could not thereafter become the property of Shipley, by

the labor bestowed on it, in manufacturing it for the use intended. So long as it could be traced and identified, it still remained his.— For at no period previous to the taking, do we find any act of the plaintiff manifesting his intention to part with the property. The case from Johnson, of the owner of timber being allowed to recover for the property when manufactured into shingles, is a very strong case to show that the owner is not divested of his ownership by any alterations the property may undergo, so long as it can be identified. It is true, in that case, the property, i. e. trees, from which shingles were manufactured, was taken without the consent of the owner. But I apprehend the principle on which the decision was founded, is applicable to this case. If the owner of timber-trees is permitted to retain his ownership when it is thus manufactured into boards or shingles, when it is taken for that purpose, without his consent, it is difficult to see why he should be divested of his ownership, when taken with his consent, to be manufactured for his use. Upon the construction of this contract, and from the nature of the case, we are of opinion, that the property of the boards and timber, for the taking of which this action is brought, was in the plaintiff.

The next question is, whether he had such a possession as to enable him to bring this action. The general principle is, that the ownership of personal property carries with it possession. The owner is constructively in possession. Where he parts with possession and use for a definite time, he cannot maintain trespass against any one who takes it during that time. Such was the doctrine laid down in the cases cited. Here was no parting with possession: the property all the while remained in the plaintiff. The possession of Shipley was that of an agent to manufacture for the plaintiff's use; and he had no other possession than he had of the team for drawing the same: Nothing more than every hired man or agent has, of property entrusted to him, to use in the business of, and for the benefit of the owner. If Shipley had converted it to any other use, he would have been immediately liable; and if any one took it from Shipley, while in the employ of the plaintiff in completing the job, such person would be immediately answerable to the plaintiff; and it would be a direct injury to the property of the plaintiff, in the hands of his agent, and of course an injury to the possession, for which the action of trespass is the appropriate remedy. The evidence introduced, directly tended to prove the plaintiff's cause of action, and the defendant was not entitled to the charge requested.

Judgment of county court is therefore affirmed.

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CHESTER STONE vs. SETH E. WINSLOW.

The debit side of the plaintiff's book, as presented by him to the justice, is by inspection to determine the jurisdiction in the action on book.

Because there is another item which he might charge, whether interest or any thing else, which if charged would make the account exceed one hundred dollars, that does not take the case out of the justice's jurisdiction.

If, by the defendant's request, that item of interest is computed in striking a balance, he in writing waiving all exception, that will not subject the case, after appeal, to being dismissed by the county court, if the judgment both of the justice and the auditor is less than one hundred dollars,

This was an action on book, originally commenced before a justice of the peace, and which came by appeal to the county court. At the county court a judgment to account was rendered against the defendant, and an auditor was appointed, who made the following report to the November term, 1834.

"The auditor, after being duly sworn, proceeded to examine and try the matters in issue in book between the parties, and reports the following facts:

At the commencement of the accounts between the parties, it was agreed that interest should be cast upon the balance of the account at the end of each ninety days to the time of settlement. The item of interest hereafter mentioned was computed agreeably to said contract.

At the justice trial, the plaintiff presented to the court his account, of which the within is a transcript. He also presented a transcript of the said account, which account, so presented, contained no item of interest, and did amount to \$97 80.

The plaintiff, at the same time, brought into court on a separate slip of paper, the item of interest amounting to \$6 10, and declined presenting the same on the ground that said item added would increase the amount of his account to a sum without the jurisdiction of the justice. The defendant at the same time consented that said item might be presented and go in to make up said judgment, and requested of the plaintiff that the same might be done, saying that it was fair and right, at the same time saying that that should be the end of the said suit.

The defendant, at the same time, wrote upon the back of said writ and signed the following agreement:—"I agree that I will not take any exception to the jurisdiction of the justice in this case on the ground of the plaintiff's account amounting to more than an hundred dollars on the debtor side, or on any other ground existing previous to the decision or judgment of court this day."

The plaintiff then and previous to the rendition of the judgment by the justice added to the transcript of his said account the said item of interest, being \$6 10, which said item went into and was made a part of the judgment rendered by the justice, (which judgment was about \$35.) The said item of interest was entered on ledger by plaintiff after the trial before the justice, and on the trial before the auditor the said ledger stood footed on the debit side at \$103 90. On the trial before the auditor the plaintiff presented the transcript of account without the item of interest, which transcript is endorsed, and did not insist in being allowed the said item of interest.

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The defendant's counsel objected to any proceeding on the part of the auditor, on the ground that the court had no jurisdiction of the subject matter of the suit; but the auditor overruled said objection on the ground that it was his duty to present the facts to the court.

The auditor allows all the items in the plaintiff's account.—He also allows all the defendant's account enclosed, except the item marked No. 1, which he allows at \$1; also No. 2, which he allows at \$2; also No. 3, which he allows at \$3 42.

He therefore finds due from the defendant to plaintiff to balance book accounts the sum of thirty-six dollars and eighty cents.

O. P. CHANDLER, *Auditor*.

To which the defendant filed the following exception:

Windsor County Court, November Term, 1834.—The defendant appears and excepts to the acceptance of the foregoing report, and moves this honorable court that the same be rejected, and that the action of the said Stone against the said Winslow be dismissed from the records of said court, because he says that this honorable court has not jurisdiction of the sum for this.

That the court, before which said action was commenced, and from which it was brought to this court by appeal, had not jurisdiction of the same as will sufficiently appear from the facts disclosed by said report.

By his attorney,

ANDREW TRACY.

Tracy for the defendant.—The case presents the following questions:

1. Had the justice, before whom this action was commenced, jurisdiction of the same?
2. If the justice had no jurisdiction, did the county court take any by appeal?

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3. Can the want of jurisdiction in the justice be cured by any act or neglect of the parties?

The first proposition is believed to be the only one requiring much examination.

By the statute of 1821, the jurisdiction of justices of the peace is extended to "all pleas and actions of a civil nature," other than certain actions particularly specified, "where the debt or other matter in demand does not exceed the sum of \$100." By the statute of 1823, their jurisdiction in actions on book is limited to cases "where the debit side of the plaintiff's book does not exceed the sum of \$100; and the inquiry here is, did the debit side of the plaintiff's book exceed the sum of \$100?

The defendant maintains that it did.

From the facts found by the auditor it appears that the articles charged in the plaintiff's account amounted to \$97 80, and were delivered under an agreement that interest should be cast on the balance at the end of every ninety days, and the interest so cast amounted to \$6 10, which added to the original sum of \$97 80, makes the amount \$103 90.

If then the interest makes a part of the debit side of the plaintiff's account, within the intent and meaning of the statute, it is manifestly true that the debit side of his account in this case exceeded the sum of \$100, and consequently the justice had no jurisdiction. That it does, as much as either item charged them, is most clear. What did the legislature intend by the debit side of the plaintiff's book? Most clearly, neither more nor less than that side of his book in which the debt or claim against the defendant is to be found.

What then was the debt or claim of the plaintiff in this case, looking to the debtor side of his book alone? Clearly the sum due him on that side of his book, without reference to the other, as well the interest as the principal; for it cannot be pretended that the interest was not due him.

By the terms of the agreement, interest was as much to be paid him as the price of the articles sold. The contract was an entire one, and interest was cash agreeably to the contract, and went into and formed a part of the judgment rendered by the justice.

If the interest was due on the account, was it not as much a part of the debt due as any portion of the account. Most clearly it was, and if so, the amount exceeded \$100, and the justice had no jurisdiction.

If such be not the construction given to the act of 1823, then it

follows that the legislature has intended to give to justices, in actions of this kind, an extent of jurisdiction which has been denied them in all others.

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That the county court took no jurisdiction by appeal, if the justice had none, and that jurisdiction could not be inferred, or a want of it cured by any act or neglect of the parties, is believed to be to well settled to require argument.

Coolidge for plaintiff.—The act of November 15, 1821, in addition to the several acts defining the powers of justices, &c. enacts that the justice may have, &c., “where the debt or other matter in demand, does not exceed one hundred dollars.” The debt demanded in the plaintiff’s writ not exceeding that sum, no construction of that act can bear upon the point here raised.

But the act of November 3, 1823, in addition, &c, enacts that a justice of the peace shall have, &c., “all actions on book account where the *debit side* of the plaintiff’s book shall not exceed the sum of one hundred dollars;” and the question is,

What constitutes the *debit* side of an account, within the true intent and meaning of the act last cited?

The plaintiff contends that the plain and obvious meaning of the word *debit*, or debt, requires that the term be restricted to that which forms the *basis* of the demand—in other words, it is the principal sum and that only. The object of the general law is not to preclude a justice from rendering a *judgment* for a sum exceeding one hundred dollars; for he may so do on confession of the party. But it is designed only as evinced by the whole of the act in question, to forbid the justice to *try*, and adjudicate upon a claim which involves the right to a larger sum; and this on the principle that, although the plaintiff shall claim as balance a sum below the one hundred dollars, yet that balance may arise upon the amount of thousands of which the same being disputed, the justice would be the trier, and consequently have, in this respect, an *undefined* jurisdiction—The amount of debit presented to the justice for trial and adjudication was \$97,80 and no more was claimed as *principal*, or debit. The plaintiff does not contend that jurisdiction can be conferred on any contract of the parties. Nor, upon the ground assumed by the plaintiff was any thing necessary to sustain the jurisdiction. The attempt which appears to have been made to remove any doubt on this point will not, is apprehended, prejudice the plaintiff, who seems, through the whole proceeding, to have been grossly imposed upon, and deceived by the defendant. Nor

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will the mere adding the sum of interest to the account, and thereby increasing it nominally, to an amount exceeding the one hundred dollars, have any legal effect; the question still remains as to what constitutes the debit.

Again—The plaintiff insists that interest is no part of the debt, but is merely *damages*.—1 H. Blackstone, 303.—3 Taunton, 157. 8 Campbell, 258 and note.—2 N. R. 205, and notes of Mr. Day the editor.—5 Esp. Cases, 114.

The true principle on which interest is allowed in judgment, is that it is a consequence of a tort, or breach of another contract, and as such creates a right to compensation as consequential damage.

But the case shews that interest was agreed to be paid by rests in the account at the end of each ninety days, and it may, and probably will, be argued that by this agreement interest after it accrued, became incorporated with and formed part of the debt. To this it is replied, that the interest is still but damages, the right of which depends entirely upon the performance or non-performance of the principal contract, of which it is simply a *consequence*.

The opinion of the court was delivered by

COLLAMER, J.—If the justice of the peace had jurisdiction when he rendered the judgment, the county court had appellate jurisdiction of the cause, of which the subsequent events could not deprive them. The question then is, had the justice jurisdiction of the cause? If a court presume to act where the *subject matter* is not within its jurisdiction, the court, and all acting under its authority, are, generally, trespassers. When such are the consequences, the law, defining the jurisdiction, should be simple and definite and obvious of determination. It must never be necessary to enter into the merits or try the case to determine the jurisdiction. By the statute of 1821, the justice may hear, try and determine, &c., “when the debt or other matter in demand does not exceed one hundred dollars.” This, where the declaration was special or on the contract, as on a note, was simple and certain; easy of determination by *inspection* of the declaration and contract. If a note exceed one hundred dollars, and is sued before the county court, the jurisdiction of that court cannot be taken away by showing that money had been paid on the note which *ought to have been indorsed*, and which if indorsed, would have brought it within the jurisdiction of a justice of the peace. For had that same note been sued before a justice he could not have

taken jurisdiction by inspection of the note, as the law intended; but must have entered into trial of the merits of the payment in order to ascertain his jurisdiction. This was decided in a recent case in the county of Addison, (bank of Middlebury *vs.* Tucker.) The justice can never be compelled to enter into matters not apparent of the declaration and contract on which it is founded, and to judge of that matter at the peril of being a trespasser if he judge wrong.

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The action of book account is not founded on contract. No contract is disclosed by the declaration which the justice can *inspect*. It is like general counts in assumpsit. This left doubt and uncertainty which was intended to be clearly settled by the statute of 1823 in relation to the action on book. That act provides that in such action the justice shall have jurisdiction only "where the debit side of the plaintiff's book shall not exceed one hundred dollars." This is a clear, definite, certain rule, and by it every case may be certainly and instantly determined by an *inspection* of the standard given, as questions of jurisdiction ever should be. The justice is not to resort to matters not apparent of the book, resting *in pais*, and which may be of uncertain determination. It is out of the rule of law and improper for the defendant, to offer to show that the plaintiff has not charged as high a price as was agreed, or has not charged all the articles sold or any other matter, out of the book, to enhance the debt or alter the jurisdiction; nor is it material whether such allegation be true or false, or whether it be conceded by the parties or not. It is setting up another and different rule from the statute. In this case the debit side of the plaintiff's book, and all on which he insisted was \$97,80, before the justice. The matter of interest was not apparent of the declaration or book, and therefore could not be considered by the justice in settling jurisdiction. The circumstance that the parties *afterwards* consented that a certain amount of interest should be reckoned in striking the final balance cannot alter the jurisdiction of the court, unless thereby the balance was made to exceed one hundred dollars, which was otherwise in this case. Had this interest or any item of like or greater amount been charged before action, and then sued to the county court, the jurisdiction could not have been ousted by the defendant showing that such item ought not to have been charged. This shows that the rule given by the statute, the debit side of the plaintiff's book, is the invariable rule, whether that book be right or wrong.

Judgment affirmed.

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JOSIAH PRATT vs. JOSEPH A. GALLUP.

In an action on book, a defence arising from a tender and refusal, may be taken advantage of before auditors.

The parties are not competent witnesses to such tender, but it must be proved by other evidence than the oath of the party.

An account for goods sold, and charged after an action is commenced, are to be adjusted by auditors.

This was an action of book account, brought originally before a justice of the peace, and carried up to the county court by appeal, and now comes before this court on exceptions taken by the plaintiff to the judgment of the county court upon the report of auditors. The report disclosed, among other things not necessary to be stated, that the defendant had plead a tender to the plaintiff of \$2, 50, which he charges on book, and attempted to sustain by his own oath, slightly corroborated by the deposition of one H. M. Bates. The report however states, that the tender was allowed by the auditors upon the oath of the party alone.

It also appeared from the report, that subsequent to the commencement of the suit, the defendant had sold and charged to the plaintiff on book, three dollars for a calf, in relation to which, the auditor found the following facts :

That a day or two previous to the date of said charge, the said Gallup sent the following writing—"My calf is now fit to butcher, and I am going away to be gone a week or so. If you want him, you may come and agree on the price, and take him, and pay me before long;"—that in pursuance of the request in said writing, the said Pratt came up to the said Gallup's, (the said Gallup being absent on a journey) and agreed upon the price of the calf with the said Gallup's hired man, at three dollars, and took the calf away;—that at the time the calf was taken, nothing was said about the pay; but it was left to be arranged with said Gallup;—that the said Gallup never applied to Pratt for pay for the calf, but that, on the morning of the 5th day of May, 1834, (it being the day of our sitting) the said Pratt sent one Samuel Brown, as his agent, with three dollars in money, (being the amount of said Gallup's charge for the calf) who, on the said morning, as agent as aforesaid, offered it to said Gallup as payment for said calf; but that said Gallup refused to receive it, alleging "*that he had other accounts to be settled with Pratt*";—that the said Pratt testified (which there was no evidence to contradict) that he never authorized nor expected said calf to be charged on book, to

he brought into this accounting, and that he should not have bought, had he not considered it as agreed by said Gallup that he would receive the pay for said calf when it should be offered him, according to the terms of the said Gallup's writing, annexed as aforesaid.

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Two questions arose in this case, first, whether a party in an action on book account was a competent witness to support a tender.

2d, Whether an account for goods sold and delivered, and charged on book after the commencement of an action, was to be adjusted by the auditors.

The first question was decided in the affirmative by the county court.

E. Hutchinson, for plaintiff.—We are not disposed to question the principle, that the parties are made general witnesses, by statute, to all matters necessary to be inquired into in adjusting their respective accounts, even though in some instances it may involve an inquiry into a special agreement. But whenever any fact is put in issue, which *might* have been specially pleaded in bar of the action, (were there nothing else in the case, requiring it to be sent to auditors,) to such fact, it will be found, that the oath of the party has never been considered competent testimony. That the party cannot testify in court, if so pleaded, is decided in *Reed vs. Barlow*, 1. Aik. Rep. 147. It is also there decided, that the defendant, by neglecting to plead the matter in bar, does not thereby preclude himself from urging the same defence before the auditors.—But that, by adopting the latter course, he makes himself a competent witness to a fact, to which he would be incompetent by the former, we think, is nowhere decided. In Connecticut, the authorities very fully and explicitly recognize the distinction above taken.

“Tender, release, accord and satisfaction should be pleaded specially.”—1 Sw. Dig. p. 728.

“Where by special pleadings, as in the case of *tender*, accord, or arbitrament, any matter of fact is put in issue, it is *not* competent for the parties to testify to it.”—1 Sw. Dig. p. 729.

In the case of *Bryan vs. Jackson*, 4 Con. Rep. 288, (decided in the year 1822) it will be perceived that their courts have gone the whole length of courts in this state, and allow the parties, “quoad the book debt, to testify freely and fully, like all other witnesses, in support or confutation of the account.”

Yet, in the case of *Weed vs. Bishop*, in 7 Con. Rep. 128, (decided in the year 1823) the court decide, that the party is not com-

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petent to prove a new promise, to take the case out of the statute of limitations; and, in commenting upon the above cited case of *Bryan vs. Jackson*, the court say, "It is understood, that some general expressions, in the opinion of the Chief Justice, have been pressed into an authority for making the party an unlimited witness. The opinion warrants no such conclusion. On the contrary, it is limited thus: 'Where proper articles are charged on book, the parties, *quoad the book debt*, are admissible, like all other witnesses, to testify freely and fully, *in support or confutation of the account.*'" The opinion of the court then proceeds, "It would be doing violence to the language employed, to say, that it is hence to be implied, that a party may testify on an issue formed on a release, or *tender* pleaded; nor, within the knowledge of the court, has such a principle ever been recognized. Testimony on such issues, surely, is not '*quoad the book debt*,' nor '*in support or confutation of the account.*'"

In the case of *Terrill vs. Beecher*, in 9 Con. Rep. 349, (decided in the year 1832, and reported in the year 1834,) the court, in their opinion, say, "Parties are not unlimited witnesses. They cannot testify on an issue formed on a plea of *tender*, or release, or accord and satisfaction, or a new promise to revive a debt barred by the statute of limitations;" and cite the case of *Reed vs. Bishop*, 7 Con. Rep. 228.

Aiken and Edgerton for defendant.—The only question presented in the bill of exceptions, is whether or not, in a book account action, the party is a competent witness to prove his own tender. It is insisted by the defendant, thath he is.

1. A party may be witness to prove a payment.—*Stevens vs. Richards and Trusdell*, 2 Aik. R. 81.—*Fay et al. vs. Green*, *ib.* 386.—*May et al vs. Corlew*, 4 Vt. R. 12.

2. A tender is defined to be the formal offer of a debt to the person to whom it is due.—15 Petersdorf, top page 15, note. 5 Bai. Abr. 1.

And it is not perceived why a party should not be permitted to testify to the offer of payment made under such circumstances as to create a tender as well as to the payment itself.

3. Although a tender, at the time it is made, if enforced, does not discharge the debt, yet if the money tendered be sufficient, and be kept in readiness, and be brought into court for the creditor, (which is shown by the auditor's report to have been done in the presentation) the debt is thereby discharged, it then becomes a

payment, and as such, has relation to the time of the tender.—
 Chip. on Cont. p. 52. 5 Bac. Abr. 19. Str. 1027, *Cox vs. Robinson*.

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The party is permitted to testify that he offered his creditor the money, and that the creditor received in satisfaction, it is with equal reason competent for him to bring the money into court, and then testify that he had offered it to the creditor, and that the creditor refused to receive it, in one case the testimony is, that the money was received, and in the other, that it was refused.

If the party's interest in the suit as a temptation to perjury forms any reason for excluding his testimony in either case, it would seem that this reason would exist with much more force in relation to a payment than to a tender, inasmuch as proof of a payment which in fact was never made, might save to him both debt and costs, whereas a tender with the production of the money in court, could save him from the costs merely.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The first question which arises in this case is, whether the fact of a tender, relied on by the defendant, was sufficiently established. The auditors state, that it was found from testimony of defendant alone, and the question is, whether he was a competent witness to that fact, in the trial before auditors. It is, and has been for a long time, *vexata questio*, as to what facts the parties may testify in this action; and it is difficult to lay down any general rules upon the subject. Most of the questions arising are referred to, and are decided by auditors. Parties are witnesses before them, but they are not witnesses on the trial of any issue joined to the court or jury. From the course of decisions on this subject, many questions which were formerly considered as proper to be tried by jury, must now be tried by auditors. It has been decided that the plaintiff is not bound by his account given on oyer: he may produce a fictitious account in oyer, to which, defendant cannot, with safety, plead payment or tender, and is therefore deprived of the benefit of such defence, unless he can avail himself of it on the hearing before auditors. It has also been decided, that a defendant, before the auditors, can avail himself of the non-joinder of another, who should have been made defendant, contrary to the rule which, in other cases, requires this to be plead in abatement. It has also been decided, that a party may testify to a new promise, the effect of which is, to take an account out of the operation of the statute of limitations. This decision was however qualified, by

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saying, that on the testimony of the party *alone*, the auditors should not find the fact of the new promise to avoid the operation of the statute of limitations; and indeed, it is difficult to give any good reason why the party should be precluded from testifying to this fact, when he is made a witness for purposes so extensive as he has been, both in Connecticut and in this state. Qualified as this decision was, there can be no objection to it. As most every question in relation to an account, comes before auditors, and as the parties there are witnesses, and can avail themselves almost of every defence, if they are not permitted to testify in relation to any particular defence, it must be because that defence is made an exception to the general rule. The exception cannot well be derived from any general principles which are established on the subject. If we could separate the defences, and say that one defence could only be plead to the action, as a reason why the defendant should not account, and that another could only be taken advantage of in the hearing before auditors, we could then adopt as a general rule, that any matter which must be thus put in issue by a plea, must be proved by testimony other than the oath of the party. In relation to the particular defence relied on in this case, we are, however, inclined to say, that if a party relies on a tender of the amount due, although he may avail himself of this in the hearing before auditors, yet he must prove it by other testimony than his own oath;—that this must be considered as an exception to the general rule, which admits the party to testify to those matters which are a discharge, as a payment, or a settlement, &c. The decisions which have been made in relation to the testimony of a party, have been founded on a principle which will not apply to the case of a tender. In an action or claim on book, the plaintiff is permitted to testify to the sale and delivery, and to every material circumstance which constitutes the ground of his action, and this upon the supposed confidence existing between the parties. The sale and delivery of goods, or performance of services, are usually charged on book, or rest in account; and reliance is had on the book, and on the oath of the party to substantiate the charge. The defendant, by examination of the plaintiff, should be of course entitled to the same testimony, as to every thing which may be supposed to have passed between the parties in the same way, and arising from this mutual confidence in discharge of the claim. Hence we may examine the plaintiff as to any agreement about the price, the mode of payment agreed on, whether the goods or services were delivered or performed to or for the benefit of the defendant, or in payment or ex-

tinguishment of some antecedent claim which the defendant held against the plaintiff,—in short, whether there is any indebtedness from the defendant to the plaintiff. And as he may be subject to an action on the testimony of a plaintiff, and might not be able to substantiate his defence by the same testimony, it would be the height of injustice to leave him at the mercy of the plaintiff, or compel him to rely on the testimony of the plaintiff alone. The law therefore has provided, that he may also avail himself of the benefit of his own oath—may relate the facts as he understands them, and leave the triers to decide upon the weight of testimony, and so far there is no injustice or hardship, as the testimony only is to what may be supposed from the nature of the dealings between the parties, and from the confidence which is always placed in each other in relation to matters of account, to rest between them, and to have taken place between them alone, when no witnesses were called. It is to be observed, however, that no decision has as yet permitted the party to testify to any thing but what might either be given in evidence on the general issue, in an action of assumpsit, or but what would on some proper plea, be a full and complete defence in that action. A tender however is not of this description. It is only a temporary bar to the plaintiff's claim. It is an adversary proceeding, commonly made where a controversy is expected. Witnesses are usually called, and moreover, the tender must be kept good, and the money brought into court; and altho' it may be taken advantage of before auditors, for the reasons already suggested, yet I apprehend the money must be brought into court, and deposited for the use of the plaintiff;—that it is not sufficient to produce it to the auditors, who are only the triers of the controversy between the parties. As a tender is an adversary proceeding preparatory to a legal controversy, where witnesses may be, and usually are called, it is not a proceeding where the parties may be supposed to rely on the testimony of each other, and where there is no confidence placed. The reasons which have induced the courts to decide that a party may testify to a payment or settlement, or that which goes in discharge of the plaintiff's claim, do not require us to decide that the parties should be witnesses about the same. On this part of the case, therefore, we are of opinion that the party was improperly permitted to testify in relation to the tender.

On the subject of the charge for the calf, it may be remarked, there is nothing from the facts found by the auditors, by which we can say that it was not a proper charge on book. It seems the calf

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was purchased in February, probably without any idea of its effect on the suit then pending. Whether there was any design on the part of Gallup, that it should have any effect on this suit, we can only conjecture; but as it was sold three months before the meeting of the auditors, and was a proper subject of a charge on book, for which no other security was taken, and must or might be recovered in an action on book, we can find no legal reason why it should not be allowed to the defendant. It having become a part of the account between the parties, the defendant was not obliged to receive the pay therefor and subject himself to the consequences of its determining this suit against him. If this operates injuriously to the plaintiff, it arises from the statute, which provides, that in actions of account, the auditors must take the account to the time of auditing.

This is not the first case which has been before us, where the balance of the account has been changed by the dealings between the parties, had subsequent to the bringing the action, so as to turn the case differently from what it would have been decided at the commencement. In this case, however, if the tender was actually made, as testified by the defendant, and which the auditors, from his testimony found, and there is some reason to suppose that it might have been so, from the deposition of Henry M. Bates, there was nothing due to the plaintiff at the commencement of this suit, and as he has availed himself of the advantage which the law gives him to exclude that evidence, which was improperly received by the auditors, but which however was satisfactory to them of the fact testified, he must of course rest satisfied under the disadvantage which he is laid under in consequence of another principle of law, which operates to the advantage of the defendant.

The result is, that on the alternative presented by the auditors, that if the court should be of opinion that three dollars for the calf should be allowed, and the tender was not legally sustained, there is due from plaintiff to defendant the sum of fifty cents, the defendant will be entitled to judgment for that sum.

The judgment of the county court, which was only for the defendant to recover his cost, must therefore be reversed, and judgment entered for defendant to recover fifty cents and his cost.

ISAAC BROOKS *vs.* SYLVESTER EDSON.WINDSOR,
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"And the said note was afterwards by the said A. B. on the day and year last aforesaid, at W. aforesaid, endorsed and delivered to the plaintiff," is a sufficient allegation of the assignment or endorsement of a note.

This was an action on an endorsed note made payable by the defendant to one R. Daman, or order, and by said Daman endorsed. That part of the declaration which set forth the endorsement was as follows: "And the said note was afterwards, to wit, on the day and year last aforesaid, endorsed and delivered by the said Daman to one Erastus Burgiss and Jehial Griswold, and by the said Burgiss and Griswold endorsed and delivered to the plaintiff, to wit, on the day and year last aforesaid at Woodstock, aforesaid, and of this the defendant had notice, to wit, at said Woodstock; and the said note being so endorsed as aforesaid, the defendant became liable to pay said sum in said note specified, to the plaintiff, and afterwards, to wit, on the day and year aforesaid, on the endorsement thereof, promised the plaintiff to pay him said sum in said note specified and the interest." To this declaration there was a general demurrer.

At the county court judgment was rendered, that the declaration was sufficient, to which there was exception, and the cause passed to this court.

Marsh and Williams, for the defendant.—"A plaintiff who sues upon a bill or note must show in his declaration his right to sue thereon in the same manner as every other plaintiff must shew a sufficient title, to enable him to maintain the action which he brings."

Thus in an action by the endorsee, a bearer of a bill, it is necessary to shew that it authorized a transfer, and he must state *that the transfer was made.*—Bailey on bills, 180.—Chitty on B. Phil. Ed. 1821, p. 460.—Chitty do. N. Y. ed. by Huntington 1830, p. 350.

"Whatever forms a constituent part of the plaintiff's title must be set out correctly."—Chit. Phil. Ed. 460.—N. Y. Ed. by H. 350.

The forms in books of precedents, as established by usage in courts of justice are a part of the law of pleading and considered as binding as any part of the law. Such forms, as well as the law in general, have been simplified and improved, and nothing now is retained but what is essential to be stated and averred.—2 Saund. Plead. 740.—1 Ditto, 270, *et Seq.*

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Averments of a *delivery, his own hand writing thereto subscribed, for value received*, are not necessary in a declaration, and several others which could be mentioned—and so are the declarations as set forth in the precedents and the notes to said forms.—Chit. on Bills, Ph. Ed. 461–462.—Do. N. Y. Ed. by H. 357, forms 492–3—notes.—10 Johns. 418, *Saxton vs. Johnson*.

And it is there said that the words *for value received*, are words of description and an averment.

But all other averments not so noted are considered as essential and necessary in a declaration, to give a good and sufficient cause of action.

When a note is endorsed blank a power is given to the assignee to fill it up, and before the transfer is complete it must be filled up with the words “pay the contents,” &c.—Buller N. P. 275.

A bare endorsement without other words purporting an assignment does not work an alteration in the property.—*Lucas vs. Haynes*, Salk. 130.

Before the endorsee can maintain an action against the maker of a note, if the note is endorsed in blank, the endorsement must be filled up (which the endorsee has a right to do even on trial) with the words, “pay the contents,” &c., I order or appoint the contents, &c., because it is the order and appointment contained in such endorsement, which transfers the right and interest in such note to the endorsee and without an *order* and appointment, the terms of the note are not complied with—for the note itself expresses to order, and that order must be expressed in the endorsement, or the order in the note must be complied with, and no interest passes without it. Therefore, every endorsement must contain an order and appointment as essential to the transfer of the property and right of action in the endorsee.

If such order and appointment are material in a negotiable note such material facts must be averred in the declaration, as constituting a part of the plaintiff's title and claim to sue.

“The endorsee of a bill or note must show that it authorized a transfer, and that a transfer was made. He must state his right according to its legal effect.”—Swift's Ev. 329.

It is incumbent on the plaintiff in every declaration, founded on a breach of contract for the non-performance of which the action is brought, and consequently it is necessary to state in the declaration on a bill (or note) how the defendant became a party to it.—Chit. N. Y. Ed. 1830, p. 357.

So the plaintiff who sues upon a bill (or note) must show in his declaration his right to sue thereon.—Page 359.

“To a bill payable to order, the holder can have no title, unless the payee has actually expressed his order by his endorsement. The engagement of the acceptor is not to pay every one who shall happen to be the bearer, but those only who shall be entitled by order of the payee.”—Swift’s Ev. 332.

In all bills or notes payable to order the custom must direct how they shall be assigned; and in respect to bills payable to order, the custom has directed that the assignment should be made by a writing on the bill, called an endorsement appointing the contents to be paid to some third person.—1 H. Bl. 605, *Chitworth vs. Leach*.—Chitty on B. Phil. Ed. 170, *n. a.*—Do N. Y. Ed. 1830, 131, Note (L.)

“If the note or bill was payable to order and the action by the endorsee, such endorsement *must be stated* so as to show his title. An endorsement *by the payee must, at all events, be stated*, because without that, it cannot appear that he made an order, on the existence of which depends the title of the endorsee.”—Kyd on Bills, 124, Dublin Edition, 1791.

“And in the transfer of bills and notes payable to order, it is necessary, in addition to delivery, that there should be something by which the payee may appear to express his order.”—1 Saund. Plead. 263.

“In an action by the assignee of a note, he must set forth in his declaration such facts as to constitute an assignment in law so as to give him a right of action in his own name.”—16 Mass. 314, *Russell vs. Swan*.—Story’s Chitty, 101.

The declaration in the above case has the following words of transfer, viz: “And afterwards at said Boston on the 23d day of April, 1810, the said Jeffrey, in full life, for a valuable consideration, assigned, transferred, and set over to the said Joseph, the plaintiff’s testator, then in full life, all his, said Jeffrey’s, right, title and interest of, in and unto the note aforesaid and the contents thereof, of which the said Swan had notice.” &c.

To this there was a general demurrer:—and the court say as to this count in the declaration, “It is very clear that the first count in the declaration cannot be supported. It sets forth an assignment of a chose in action, without averring such facts as alone constitute an assignment, so as to give a right of action in the assignee.

The order and appointment, not being set forth in the foregoing

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declaration according to the legal form and effect of the endorsement, was such a substantial defect as made it fatal, notwithstanding this declaration averred a valuable consideration, assignment, transfer and set over; but the averment of the order and appointment being omitted, the declaration was decided insufficient.

The case at bar, as now amended, contains no averment of a transfer, legally and technically so called. The words *endorsed* and *delivered* are every fact set forth, and we have seen that the averment of a delivery is unnecessary. Then it stands wholly on the word *endorsed*, which of itself imports no sufficient legal set of facts whereby an order and appointment can be legally raised. An order and appointment must appear upon the declaration itself to raise a promise from the assignor or to the assignee. It must appear for what purpose it was endorsed and by whom, whether by himself or by procuration. It may be endorsed to an agent for the purpose of receiving the avails for the use and benefit of the endorser, or it may be endorsed to be carried to the credit of the endorser, or the endorsement may be made to himself. It is impossible, therefore, that the simple word *endorsed* implies an order and appointment sufficient in a declaration to enable an endorsee to maintain an action in his own name.

It must appear, from the declaration, to whom the note was transferred, with proper words, set forth with legal certainty to show the interest transferred, for such transfer is a constituent part of the declaration to enable the endorsee to maintain his suit.

Every averment, material and necessary must be set forth in a declaration, or the plaintiff cannot recover. The endorser stands in the place of a new drawer, (or maker of a note) and the averment of an order and appointment in the transfer of a note payable to order is essential to show the endorser's liability, and to connect the endorser as a party to the bill. Without such order and appointment there can be nothing to make him privy to the note or bill, and if a distinct cause of action does not appear upon the declaration it will be bad on general demurrer.—1 Wilson Rep. 88.—Story on Plead. 34, N. 6.

It is now the practice in declaring on an endorsed note or bill, when there are several endorsers to set them forth in a concise manner, but at the close of this short statement, the plaintiff must set forth an order and appointment from his own immediate endorser, as is found in the forms in all the approved authorities.—Chitty on Bills, Phil. Ed. 632. N. Y. Ed. 1830, 493—359—60.—1 Saund. Pl. 269.

And for the want of a proper averment of the transfer in this declaration, it is therefore bad.

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T. Hutchinson, for the plaintiff.—In support of this mode of declaring, we cite 3 Chitty's Plead. 13, where he gives the form in these words: "And the said S. H. (the payee) then and there endorsed and delivered the said promissory note to one J. K. who then and there endorsed and delivered the said promissory note to the said plaintiff," and he says in a note, "this concise mode of stating the endorsement, will in all cases suffice." We also cite Oliver's Precedents, page 138-9, where he gives exactly the same form.

The opinion of the court was delivered by

COLLAMER, J.—*Bills of exchange* were negotiable by the law merchant, and in a particular manner, by an order or appointment of the contents to be paid, &c. In relation to bills resting both in England and here upon the law merchant as a part of the common law, perhaps it would be necessary to declare in the manner insisted on by the defendant's counsel, and as the authorities by him cited seem to imply; for in that case, the plaintiff's right of recovery arises from the contract. Notes of hand rest on a different law. The right of action is given by statute, and does not simply arise from the contract; and if the declaration contains sufficient allegations to show the plaintiff is entitled by the statute to recover, it is sufficient. The statute 3d and 4th Anne, after providing that the payee of a note may maintain an action on the note in his own name, as he might do on an inland bill of exchange, provides that *any person to whom such note is endorsed or assigned, or the money therein mentioned ordered to be paid by endorsement thereon,* may maintain his action in like manner as in case of inland bills of exchange. For some time after the passage of this act, it was considered by the profession that notes were put on the ground of bills of exchange, and the mode of declaring either by the payee or the endorsee was to state the execution of the note, &c. the liability *by the custom of merchants*, and then raise an assumpsit; and so are many of the ancient forms.

On a more full examination and liberal view of the statute, and in pursuance of the growing liberality and conciseness of modern pleading, the forms of declaring on *notes of hand* have essentially changed. It is now considered that the action may be *on the note*, and assumpsit may be sustained on the promise contained in the

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note, without stating a liability, and then raising an assumpsit thereon.—*Binney and Broadhead vs. Plumley*, 5 Vt. Rep. 500.

The statute provides that an action may be sustained by any one to whom it is endorsed or assigned, or the contracts ordered to be paid. Here are three distinct provisions. Formerly on the same view that notes were put simply on the ground of bills, the declaration was on the last clause, and formally set forth that the contents were appointed or ordered to be paid by endorsement thereon, &c., then stated that thereby and by the custom, &c. the defendant had become liable, and then raised an assumpsit. Gradually this was relaxed, and now it is the practice to sustain the action on the other clause of the statute, to wit, the person *to whom the same is endorsed*, or if the note be to *bearer* to whom it is assigned, which may be by delivery. As *endorsee of a note*, it is necessary to allege, in order to entitle the plaintiff to recover, not so much what would give him the action *by the contract* but *by the statute*. For this purpose, it is but necessary to show the defendant executed such a note as is within the statute, and that the plaintiff is the endorsee thereof. The form given by Mr. Chitty (Plea. vol. 3, p. 13) for an *endorsee of a note* is this: "And the said G. H. then and there endorsed and delivered said note to one J. R., who then and there endorsed and delivered the said note to the plaintiff." And in his note he says, "this concise mode of stating the endorsements will *in all cases* suffice."

By our statute, which makes no provision like the statute of Anne for the payee to have an action *on the note*, provision is made that the *endorsee* may maintain the action. All that can be necessary under our statute on this point is, to show the plaintiff to be *endorsee*, as under the statute of Anne. That the payee did *endorse* and deliver the note to the plaintiff, is all that can be necessary; as the word *endorse* is a *technical* word, having in law a distinct meaning, without the declaration explaining the mode or manner in which it was done,

Judgment affirmed,

WINDHAM COUNTY.

FEBRUARY TERM, 1835.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*

“ “ SAMUEL S. PHELPS, } *Assistant Justices.*
“ “ JACOB COLLAMER, }

WHITE vs. YAW AND GILLET.
(*In Chancery.*)

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All the equity which entitles a person to relief, should be stated in his bill.

Where a party wholly fails to perform a contract, by the time stipulated, and gives no reasonable excuse therefor, he cannot require a specific performance of the other party, by an offer to fulfil on his part, after the time.

A statement of the case will be found incorporated into the opinion of the court, and the argument of counsel.

J. Phelps for defendant.—The bill states that the plaintiff made a contract with one John Noyes, to purchase of him a tract of land;—that he was to pay \$210 for the same;—that he paid Noyes in hand \$34;—that the plaintiff applied to Yaw to borrow \$176, part of the \$210;—that Yaw executed his note to Noyes for the same, and the plaintiff thereupon gave two notes to Yaw of \$88 each, each dated the 29th September, 1827—one of which was payable in one year, and the other in two years from the date, with interest;—that for the purpose of securing the pay of said notes to Yaw, Noyes, by the agreement of the parties, executed the deed to Yaw; and Yaw thereupon gave his penal bond to White, conditioned that said bond should be void, if, upon the payment of said notes by White, Yaw should procure a good and sufficient deed of the land to White;—that White thereupon went into possession, and hoped Yaw would have accepted the money and executed a deed. The bill charges that Yaw refuses to receive the amount, and to execute a deed. And because the ora-

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tor did not pay, Yaw commenced an action of ejectment on or about the 1st of June, 1830 ;—that orator could make no defence at law ;—that Yaw recovered judgment, and entered upon said land under a writ of seisin ;—that he put Gillet into possession, with notice of orator's equitable right ;—that Yaw refuses to come to account ;—that he still holds the notes—Prays that an account may be taken, and that upon payment of principal, &c. (*White, the orator, is ready and offers to make, and to that end will bring the money into court, when your honors shall order and direct,*) that Yaw may give up said notes to be cancelled, surrender the possession, and make a deed to orator. To this complaint the defendant pleads a general demurrer.

The plaintiff appears to treat this case as if it were a question of "real estate granted upon condition, by deed of mortgage or bargain and sale with defeasance." It is neither. The plaintiff never owned the land,—never had a deed of it,—never had a legal or equitable interest in it. His interest was personal and unconditional merely. All he shows is a penal bond for a deed ; and as a condition precedent to which it became his duty to pay the money before he can ask for a deed, or forfeiture of the bond. This is all the contract or privity between these parties that he shows. This court cannot alter, or make contracts for parties. It cannot change a mere *contract for* a deed into a deed of mortgage, or of bargain and sale with defeasance. This contract, in its legal and equitable effects, must stand as the parties left it. Then how did they leave it ? What were the respective rights and duties of the parties ? And what their remedies ? Clearly then, on the 29th of September, 1829, or within a *reasonable time* thereafter, it became the duty of White to pay, or offer to pay to Yaw, the amount of the notes, and request a deed. It would then have been Yaw's duty to accept the money, and offer a deed. If he refused, White might then bring his bill, not to redeem an estate which he had granted with a defeasance, for he had no such estate ; but for a *specific performance of a contract*. This bill then being brought professedly to redeem a supposed estate in nature of a mortgage, does not apply to the case. But even if it did—if the bill were in fact brought to compel a specific performance of the contract set forth in the bill, the case which he shows, does not entitle him to a decree. Here the payment of the notes by the plaintiff was made a condition precedent to the conveyance by the defendant.—*Morton vs. Lamb*, 7 T. R. 125.

In equity as well as law, the plaintiff is bound to allege and show

that he has paid or offered to pay the notes in question, and requested a deed, before he is entitled to a conveyance, or to a deed for one; and this rule applies as well to a case of mortgage, as to that of a specific performance. An allegation "that he is ready and offers to make payment, and to that end will bring the money into court when the court shall order and direct," is in effect just saying that he will abide such decree as the court shall finally make, if in his power. But that is far from saying that he had paid or offered to pay the notes when due, or before he brought his bill. The bill then should be dismissed, if for this cause only.—But if the party had in fact performed his condition, and had so alleged it, he has not shown himself otherwise entitled to a decree. Because equity will not decree a specific performance of a contract where there has been an unreasonable delay or neglect on the part of the applicant.—2 Sw. Dig. 27. 1 John. Chan. Cas. 370. 4 John. Chan. Cas. 559.

But here there has been not only unreasonable neglect and delay on the part of the plaintiff, but that delay and neglect has operated greatly to the damage, cost and injury of the defendant; and he now absurdly places his prayer for relief on the ground only that he has thus unreasonably delayed the defendant, and unjustly harrassed him. He shows by his bill, that when the notes fell due, he was in possession of the land by permission of the defendant;—that he neglected to pay or offer to pay;—that he still held over from September till the June following, when still refusing to pay, the defendant was compelled to commence an ejectment against him to recover the possession of the premises. How long he harrassed the plaintiff in ejectment, before he could obtain a judgment against him, he is careful not to state. To that end, no doubt, he availed himself of all the means the law would give him for delay, which would be until April Term, 1831.—Not one word said about paying or offering to pay all this time: and then goes out of possession on a writ of seisin, at the defendant's expense. With all this cost to the defendant, together with the great and valuable improvements the defendant has caused to be made on the land which he thus occupied for more than three years: and more than five years after the last note fell due, the plaintiff now brings his bill for a specific performance; or in other words, to obtain a deed and possession of the land, without even pretending that he has ever paid, or offered to pay one cent upon his notes to this day. This is certainly most unreasonable delay, as well as unjust and inequitable

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treatment of the defendant, by the applicant, after which he cannot be relieved.

But it is said that the defendant still holds the notes against the plaintiff, and may collect them. In answer to this, it may be seen that it is not alleged that the plaintiff has requested the defendant to deliver and cancel the notes. And besides, the taking possession of the land by the defendant, under his writ of seisin, is by operation of law an extinguishment of the notes.—2 Swift, 198.

Again, an agreement may be resisted on the ground of a parol waiver, or waiver by act of the parties.—2 Swift, 27. 17 Vesey, 356.

The bringing of the ejectment by the defendant—the refusal to pay the notes by the plaintiff, but suffering judgment and surrendering possession of the land to the defendant, two years after the notes became due, and an acquiescence therein till that time, is in legal effect a waiver of the agreement by the acts of the parties themselves.

R. M. Field, for orator.

The opinion of the court was delivered by

WILLIAMS, Chancellor.—It appears in this case, that in September, 1827, the orator made a contract with John Noyes, to purchase a certain tract of land, for which the orator was to pay \$210;—that he paid \$34, and the defendant, Yaw, paid the balance (being \$176) for the orator, who thereupon gave Yaw two notes of \$88 each, payable in one and two years;—that Noyes executed a deed to Yaw, and Yaw executed a bond to the orator, conditioned to deed to him, upon his paying the notes aforesaid;—that the orator went into possession—made improvements and betterments to the value of \$500;—that Yaw, on the 1st of June, 1830, commenced an action of ejectment, recovered judgment, and took possession by virtue of a writ of seisin;—that the other defendant, Gillet, in consequence of some agreement with Yaw, went into possession;—that Yaw still holds the notes, which the orator is willing to pay, after deducting rents and profits; and praying that the defendants may be decreed to deed the land aforesaid to the orator, on receiving the amount due.

To this bill there is a general demurrer. As the orator never had a legal title in the land, he cannot be considered as a mortgagor entitled to redeem. The equitable interest which he has in the land, arises from his paying the sum of thirty-four dollars, from the

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bond of defendant, and his being put into possession. He could have secured a legal title, by performing the condition, not as in case of a mortgagor, but by compelling defendant to a specific performance. He had no remedy at law on the land, without a strict performance at the day. In consequence of his failure, he forfeited his claim under the bond. But equity, in a proper case, can relieve against a forfeiture, particularly where a compensation can be made, and it can be done with safety to the other party, and this even where time is made of the essence of the contract, and there is a default at the day. If there is a reasonable and just excuse, or the delay has been acquiesced in by the other party, equity may relieve. But it will not and ought not to interfere, where no attempt is made by the party to perform his contract, and no reasonable excuse is offered for such neglect. When the party who is to perform a condition, wholly neglects to perform the same—pays no attention to the stipulations on his part, and drives the other party to enforce the forfeiture, he can have but little claim to the interference of a court of equity. He ought not to be permitted to lie by, and see whether it will be most for his advantage to fulfil or neglect to fulfil his contract, and ask relief from the consequences of his neglect, when he sees it most for his advantage to have the contract executed. The cases on this subject are collected and commented upon by Chancellor Kent, in the case read from Johnson's Chancery Reports. In this case, the orator asks to be relieved from a forfeiture, occasioned by his neglect to perform the conditions on his part, inserted in the bond of the defendant, Yaw.—If there was any reasonable excuse for not performing them,—if he was prevented by inevitable accident, or if there are any other considerations which, according to the principles adopted in a court of chancery, entitle him to this relief, they should have been stated in the bill. Nothing is presented as an excuse for his neglect; but on the contrary, it appears to have been a case of gross negligence on his part. He enters into possession—pays but \$34, but about one-sixth of the purchase money—fails to pay the first note in 1828—the second, in 1829—compels the defendant, Yaw, to commence an action of ejectment, and take possession; and after a lapse of six years, now seeks to compel the defendant to account for the rents and profits of the land, and convey the same to him, when he shall hereafter pay the sum due. There are no equitable considerations set forth in this bill, to entitle the orator to this relief. It is however urged, that there are reasons why this has been

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delayed, and why the orator should be entitled to this relief, which can be shown in evidence. We can only look to the bill itself: If there are reasons of this kind,—if there are circumstances to show this court why the orator should have the relief asked for—be restored to the possession of the land, and have a conveyance decreed to him, after this lapse of time, they should be stated in the bill. But a party cannot exhibit a bill in court stating no equity, and rely on supplying this want of equity, by his proof.

It is further urged in this case, that the defendant retains his notes; but it is not stated that he holds them against the will of the orator, or that the orator has ever applied for them, or that the defendant has taken any steps, or is about to take any steps to enforce a collection of them; and it may be questioned whether the defendant can pursue these notes, having so far taken the forfeiture as to sue for, and recover the land. If the condition of the bond had been to convey, on payment of the money, without taking any notes, the effect would have been the same as between these parties. But if the defendant can, and ever should attempt to enforce the collection of these notes, or treat them as evidence of, or security for a debt due to him from the orator, it may be considered as waiving the performance, on the part of the orator, of the condition to have been performed by him, and let him in to his equitable claim on the land, and in fact to the relief which he now asks for. But there is nothing stated in this bill, either as an excuse for not paying the money upon the notes, when they became due, or before the recovery in ejectment, and for suffering this length of time to elapse before taking any measures to pay the sum due to the defendant; and it would be both unjust and inequitable, when no other circumstances are shown, to treat the defendant, who was in a measure compelled to sue for, and recover the land in ejectment, as a bailiff and receiver of the rents and profits to account to the orator.

The demurrer must be allowed, and the bill dismissed with cost.

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PETER MOORE vs. JOSHUA ROBBINS.

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If sheep are taken, damage feasant, it is sufficient, if notice is given to the owner in twenty-four hours after they are delivered to the pound keeper.

Such notice need not be to appoint appraisers, if damages are not claimed by the impounder.

When personal notice is given, it may be given by an agent of the impounder if the owner actually has the notice, and receives it as coming from the impounder.

This was an action of trover for nine sheep, appealed from the judgment of a justice.

The taking was admitted by the defendant. The defendant then adduced testimony tending to prove that the sheep in question were taken by the defendant's hired man, on the last day of April, 1834, about noon of the day, from the defendant's mowing lot, and shut up in defendant's barn; the defendant being out at work on his farm, half a mile from home. He returned about two o'clock afternoon, and was informed plaintiff's sheep were in the barn. The next morning about seven o'clock the defendant started with the sheep to drive them to pound, and delivered them to the pound keeper about eleven o'clock in the forenoon, who put them into the pound in Newfane, in which town both the parties reside; that the distance from the defendant's house to the pound keeper is about seven miles. The reasonableness of the time, however, was submitted to the jury. That on the defendant's return home, he sent his man a little before sun-down of the same day to tell the plaintiff that his, the plaintiff's, sheep were driven to pound; that the man found the plaintiff absent from home, and therefore told the plaintiff's wife and hired man that the plaintiff's sheep had been driven to pound; that on the second day of May 1834, the plaintiff applied to the pound keeper and requested him to deliver to the plaintiff his sheep, but he refused, and asked the plaintiff if he had not received notice that his sheep were in pound? Plaintiff replied that word had been left with his hired man the night previous, that his sheep had been driven to pound by defendant.

The plaintiff contended, and so requested the court to charge the jury, that notice in writing should have been left at the dwelling house of the plaintiff, or personal notice given him of the impounding, and also to notify the plaintiff to appear at the dwelling house of the defendant within twenty-four hours, and appoint a committee to appraise the damages done by said sheep.

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The plaintiff also contended, and requested the court so to charge the jury, that the defendant was not authorized by law to keep the plaintiff's sheep in the defendant's barn or other place, but should have driven them immediately to the pound, on their being found damage feasant,

The plaintiff also contended that if the impounding aforesaid should be adjudged illegal, the plaintiff would be entitled to recover in this action the value of the said sheep.

But the court instructed the jury, that upon the foregoing facts, the plaintiff was not entitled to recover in this action.—Verdict for defendant.

The plaintiff took his exceptions which were allowed and certified,

Mr. Kellogg and Mr. Roberts, for plaintiff.—The instruction of the court to the jury in this case proceeds upon the supposition—either,

1. That in a distress for damages feasant, replevin is the only remedy—or,

2. That the facts in the case do not show a conversion.

1. It is insisted that the remedy by replevin given by the statute is in aid of the common law—is merely cumulative, and that the common law remedy by action of trespass or trover remains at the election of the party.—8 Coke Rep. 146.—1 Saunders on pleading and evidence, 535.—1 Cowper's Rep. 417—418 *London vs. Hooper*.

2. If the taking cannot be justified by reason of subsequent irregularities, the defendant being thereby a trespasser *ab initio*, the first taking was unlawful; and the taking being unlawful is in itself a conversion.—2 Phillips' Evidence, 118.

3. At common law *any* irregularity committed in the proceedings of a distress, rendered the party a trespasser *ab initio*, and it is still so in distresses for damages feasant.—1 Saunders pleading and evidence, 533.

4. It is contended that irregularities occurred in the proceedings of this distress by reason of which the defendant became a trespasser *ab initio*.

1. The defendant having taken the sheep, damage feasant was found, if he would justify by imponnding, to drive them immediately to the public pound, there being one in town.—Statute 450—Hammond's Nisi Prius, 385.

This then, is an irregularity in the proceedings—

2. The defendant having impounded the *distress*, taken damage

tenant, was bound "forthwith, or within twenty-four hours, to notify the plaintiff by leaving word at his dwelling house in writing or by giving him *personal notice* thereof," &c.—Statute 451.

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But he did not leave word in writing, nor did he give the plaintiff *personal notice*.

This then, was an irregularity in the proceedings—

3. If the impounding was for damages done by the sheep, and the defendant claimed damages, he was bound to have the damages ascertained in the manner and within the time limited in the statute, and the omission so to do is an irregularity.—13 Johnson, *Merritt vs. O'Neil*, 477.—10 Johnson, 254, 255, 257.—10 Johnson, *Hopkins vs. Hopkins*, 369.

In the cases last cited the failure to have the damages ascertained, was adjudged such an irregularity as rendered the party a *trespasser ab initio*.

5. But it may be said that as the *first taking* was not by the defendant, the subsequent irregularities in the proceedings cannot make him a trespasser by relation.

We answer, that inasmuch as the defendant *assented* to and ratified the taking, by impounding the distress, he thereby became implicated in the taking, and by reason of his subsequent irregularities, a *trespasser ab initio*.

So are the authorities.—11 Johnson, *Van Brunt vs. Shenck*, 377, 382.

This assent is equivalent to a previous command.—Hammond's *Nisi Prius*, 387.

Again—If the plaintiff had brought replevin, he could avail himself of any conduct of the defendant by which he made himself a trespasser from the beginning, precisely as he could, had trespass been bought.—10 Johnson, *Hopkins vs. Hopkins*, 372.

Mr. Bradley for defendant.—Exceptions on the ground, 1. That defendant ought to have driven the distress to the common pound immediately after taking.—2. That notice was not given according to the statute, either in writing or personally.

As to the first point there is no law statute or common, which requires that the distress should be driven immediately to the common pound.

It may be kept by the distrainer a reasonable time in his custody, and this is not an impounding, if it appears to have been distrained with the intention of taking to the common pound, but a mere keeping for that purpose. And it is sufficient that it be driven within a reasonable time, which is here found by the jury to

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have been done.—*Brown vs. Powell*, 4 Bing. 220.—[18 C. L. R. 411.]

As to the second point, notice was not necessary by the common law—3 Bl. Com. 12, and although in *Mooney vs. Maynard*, 1 Vt. Rep. 470, the court decided that the statute, where inconsistent with the common law, superseded it; yet, where no inconsistency exists the common law is in force,—*Id.* 476. Now the four first sections of the statute, under which this impounding took place, are all in direct affirmance of the common law; and when the impounding took place the property was out of the reach of the party and in custody of the law.—3 Bl. Com. 12. If the owner or the public wished to have or enforce notice afterwards, the remedy was by going for the penalty not in trespass or trover, which does not lie except some act is done or required to be done, which being irregularly done, constitutes in itself an abuse or conversion of the property in part or in whole, as if he procure appraisement, and thereby charge the property with a lien for damages or sell illegally, as was done in *Sutton & Beach*, 2 Vt. Rep. 42. But a negative abuse, much less a nonfeasance, will not of itself make one a trespasser.—5 Ld. Ray. 188.—6 Carpenter's Cases, Co. Rep. 146.—6 Bac. Abr. 560, Wilson's Ed.] But notice was given so that the plaintiff received it, and it was not necessary that the defendant should call himself upon the plaintiff. He might send verbal notice, and if it passed through several hands, and yet the plaintiff acknowledged it, the law would be satisfied. Written notice left at the dwelling house is used to dispense with proving actual notice. Here his appearance at the pound to claim the sheep, with the knowledge that the defendant had stated that he had impounded them, was sufficient for the jury to presume personal notice.

So too, when the plaintiff appeared on the 2d of May and acted under that notice left with his family the evening before, he adopted it, and being asked by the pound keeper whether he had such notice, and admitting it without any objection on the score of time, it fairly followed that it was within the 24 hours, especially as it did not appear but that he was at the pound within that time. If then, the impounding was lawful the action of trover does not lie on the ground of the pound keeper's refusal to deliver. He is the officer of the law, not of the party, nor acting under the party's direction, nor do his fees appear to have been tendered, and if they had see 8 Coke *ut supra*.

The opinion of the court was delivered by

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WILLIAMS, Ch. J.—The question in this case is, whether the taking the sheep in question was unlawful, or whether defendant has made himself a trespasser *ab initio*, by his neglecting to comply with the requisition of the law in this behalf. In either case, trespass or trover may be maintained. The plaintiff relies upon two principles to maintain this action, as contained in his request to the court to charge the jury, to wit: That proper notice was not given to him of the impounding the sheep, and that the defendant was not justified in keeping them in his barn, but should have immediately driven them to pound. It is made the duty of any person impounding any creature taken damage feasant, forthwith, or within twenty-four hours, to notify the owner by leaving word at his house in writing, or giving him personal notice thereof. If damages are claimed, the notice must also be to appear at the dwelling house of the impounder within twenty-four hours to appoint persons to appraise the damages. The time from which the twenty-four hours is to be computed, must be from the time of impounding, and not from the time of taking, as was argued. The person impounding is to give the notice, and he cannot be called the impounder or person impounding, until he has actually delivered the creatures impounded to the custody of the pound keeper. If they are taken from the possession of the person driving them to pound against his will, the person taking is liable to a penalty for a rescue, if from the pound keeper, the taking constitutes what is termed pound breach. The provision in relation to appointing appraisers is only to ascertain the damages. If the person impounding waives any claim for damages, as he may, it is not necessary to have any appraisers appointed.

The plaintiff was, therefore, incorrect in claiming of the court to charge the jury that it was the duty of the defendant to notify the plaintiff to appear and agree upon, or appoint a committee to appraise the damages. The other part of the request of the plaintiff is almost in the words of the statute, and he was undoubtedly entitled to the benefit of the principle of law arising from the statute. If he has been deprived of it by the neglect of the county court, the judgment must be reversed. I consider that a neglect on the part of an impounder to proceed with a distress according to the requisitions of the statute will make the distrainer a trespasser *ab initio*. It was so in England until the statute of 11 Geo. 2 c. 19, s. 19, made this case an exception from the general rule of law upon this subject. This neglect is not a nonfeasance merely,

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like the six carpenters case, it is more analagous to the case of a sheriff neglecting to return a writ. It is, however, unnecessary to examine this principle very fully, as the important question will still remain, whether in the present case there has been a failure to comply with the requisition of the statute.

The second request of the plaintiff to the court to charge the jury, is founded on the supposition that a person taking cattle damage feasant, must proceed immediately with them to the pound. This, however, is not indispensably necessary. There must be no unnecessary delay,—the impounder should proceed with all convenient despatch, and this will always depend on the circumstances of each particular case,—the distance from the pound—the time of day when taken, &c., to be judged of by the jury or court who try the case. In the application of these principles to the case under consideration, it becomes necessary to inquire whether the notice was given as required by the statute. By personal notice we do not consider that notice shall be given directly by the persons impounding to the owner. He may give this notice by an agent, but must, in such a case, incur the risk of being able to prove it when required. By leaving "*word* in writing," as the statute expresses it, he is protected, whether the word comes to the knowledge of the owner or not. By taking any other course, he must not only be sure that the notice is given and received, but also that he can prove it by satisfactory evidence when the fact is put in issue. If the notice is to appoint appraisers, it should be specified. If only the fact of impounding, word may be sent by another, but it must be made to appear that the owner had the word within the limited time, and had it as notice coming from the impounder. In this view it is immaterial through how many hands the notice may have passed, provided it comes to the owner, and he receives it as coming from the impounder. In this case it appears that such notice was given. The agent of the defendant left word with the family of the plaintiff, and the plaintiff received the notice as from him, that his sheep were impounded. This was such a personal notice as was a compliance with the requisitions of the statute. In relation to the reasonableness of the time after the sheep were taken before they were driven to pound, it appears that it was left to the jury, and their decision on that question is conclusive. Furthermore, it appears there was no unnecessary delay. From the manner in which the case is stated, there is some doubt whether any question was left to the jury. This is, undoubtedly, an inaccuracy, as there is apparently some inconsistency in the case as stated. It is

said the court instructed the jury that the plaintiff was not entitled to recover. But it appears in another part of the case, that the reasonableness of the time during which the sheep were kept by defendant after taking and before impounding, was submitted to the jury; and so also undoubtedly was the fact, whether the plaintiff received the notice left at his house by the defendant's agent. It is not, however, stated as fully and as accurately as it might have been, what questions were submitted to the jury. We think, however, it would not be expedient to send this case to another jury for them to pass upon this question of notice, when from the same facts which are detailed in this case, they should and would find that the notice was given.—On the whole, we see no reason to set aside the verdict, and the judgment thereon must be affirmed.

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SUSAN M. BRADLEY, by her Next Friend, DANIEL KELLOGG,
vs.

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RUFUS EMERSON, LUTHER FOOT, and FRANCIS E. PHELPS.

(In Chancery.)

The husband of the oratrix must be joined, unless the right claimed is in opposition to his rights, so that he should be made defendant.

This was a bill in chancery, stating that the defendants were trustees, by the deed of the oratrix by her made while sole, of certain demands and property which they were to hold and invest, and pay the interest thereof annually to her during life, and on her decease to pay the interest of one half to her husband, should she leave one, during his life, and the interest of the other half to her children, should she leave any, during their minority, and the principal to be divided among said children, or if no children, between certain collaterals named, and reserving to herself the right to make other appointment of the final distribution of the principal. The bill then states unfaithfulness and insecurity on the part of the defendants, and prays an account and relief.

To this, the defendants pleaded in abatement, that the oratrix was legally joined in marriage to Jonathan D. Bradley, who was residing with the oratrix at Brattleborough, in said county, who is not joined as a party to this bill; and for this defect for the non-joinder of the husband, the defendants pray the bill be dismissed, &c.

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Hubbard and Aikens for defendants.—Coverture, (being a personal disability) if it appear on the face of the bill, the defendant may demur.—1 Har. Cha. 403, § 5.

If it do not so appear, it is pleadable in abatement.—1 Har. Cha. 342, § 6.

A *feme covert* is incapable of exhibiting a bill *alone* (except the wife of an *exile*, or of one who has *abjured* the realm.)—Mitford, 24.

And the husband *must join*, unless the right claimed is in opposition to his rights.—Mitford, 27–8.

So, to a bill filed *against* a married woman, her husband must be a party, unless an *exile*, or has *abjured* the realm.—Mit 29.

If the interest of a party becomes *changed*, or vested in another, by death or marriage, in general all proceedings become abated.—Mit. 55, 57—also 95.

Husband tenant for life, remainder to wife for life, with several remainders over, objection to a bill by the husband alone, *allowed* because the wife was not joined; for if the decree be against the husband, the wife would not be bound.—1 Har. Cha. 394. 1 Atk. 291. See Cooper's Eq. 30.

Keyes for the oratrix.—1. The bill charges the defendants with mismanagement of the trust property of the plaintiff.

2. If a wife claims any property in opposition to the marital rights, she sues by her next friend.—*Griffith vs. Hood*, 2 Vesey, 451. *Pennington vs. Clark*, 1 S. & S. 264. Prec. in Chan. 376. Coop. Eq. 30. *Smith vs. Myers*, 3 Mad. R. 474. 1 Sim. & Saund. 100.

3. If wife be *cestui que trust*, she must file her bill by next friend.—*Kerke vs. Clark*, Prec. in Chan. 275. *Sanky vs. Gouldy*, Cureg, 87.

The above taken from Edwards on Parties, pages 145, 146, 150, 151.

The opinion of the court was delivered by

COLLAMER, Chancellor.—It is a general rule, that all who have a present vested interest in the subject matter of the bill, all who are interested in the event of the suit, must be made parties to the bill. A married woman cannot bring a bill alone, or by any person but her husband, as her next friend, unless where he has become *civiliter mortuus*, or where she claims adverse to him, and *he is, or should be, a defendant*. This is fully sustained by the authorities.

cited by both parties, and as collected by Edwards on Parties to Bills, 145.

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There is one case cited by the counsel for the oratrix, which would seem to sustain a contrary doctrine in a particular case. It is cited thus: "If a wife be a *cestui que trust*, she must file her bill by her next friend." On the examination of the case, (Prec. in Cha. 275) it will be found the husband was a defendant, and such will always be the case where the wife is proceeding to secure property to her *separate use*, or separate maintenance.

Let us now proceed to inquire whether in this case the wife is claiming an interest *adverse* to the husband,—whether his interest is identified with the defendant's, or, on the other hand, whether the husband has not an interest with the wife, and this bill is in furtherance of his rights and interest.

The bill is to enforce the faithful performance of a trust created by the wife, before coverture, out of her own property, not to her *separate use*. By the deed, the defendants agreed faithfully to manage the trust fund of ten thousand dollars, and pay the interest annually to her during life—not to her separate use. It was nothing in the nature of a jointure. She afterwards married. Now is it contrary to the interest of the husband, that this trust should be faithfully *executed* and *enforced*? It is most obvious that these annual payments to the wife became directly the property of the husband, and that it is as much his interest they should be enforced, as that any debt should be collected, due her before marriage.

Interest, on the decease of the wife, is to him and her children, on their survivorship, subject to the contingency of a different appointment by the wife. We cannot perceive how the protecting or enforcing the faithful execution of this trust is *against* the marital or any other rights or interests of the husband, or how his interest has become identified with the defendants' in having them squander and dissipate the fund.

It therefore appears, 1st, That he has a present vested interest in the subject matter of this bill, and in its event, and should be a party orator on his own account. 2d. The oratrix is not, by this bill, claiming property in opposition to the rights of her husband, and therefore she cannot sustain this bill by another, as her next friend.

Plea in abatement allowed,

CASES IN THE SUPREME COURT

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ROSWELL M. FIELD, and MARY A. FIELD, his wife,
vs.
SUSANNAH TORREY.

The marriage of a feme sole, guardian, extinguishes her power as guardian.

When she, after such extinguishment, continues to have charge of the property of the ward, and to receive rents and profits, the ward, after full age, may sustain the action of account against her, as bailiff.

In such case, a plea to the jurisdiction of the court, insisting that the whole matter is within the jurisdiction of the court of probate, cannot be sustained.

The action of account, after the termination of a guardianship, may be sustained in the courts of common law, unless the guardian has accounted in the probate court.

This was an action of account, and the declaration and pleading were as follows :

Susannah Torrey is attached to answer to Roswell M. Field, and Mary Almira, his wife, in a plea that said Susannah render to said R. her reasonable account of the time in which said S. was the bailiff and receiver of said M. A. whilst she was sole and of the said R. and M. A. after their intermarriage.

1st Count.—For that whereas said S., on the 3d day of May, 1819, at Windsor, in the county of Windsor, to wit, at Newfane, in the county of Windham, and whilst said M. A. was sole, was, and from thence until the 11th day of December, 1826, continued to be the bailiff of said M. A. of certain lands and tenements situate in said Windsor, to wit, [here follows a particular description of the lands,] and during all the time aforesaid, said Susannah, as such bailiff, had the care and management of all said lands and tenements, and good and sufficient power to let, lease, demise and occupy the same, and to collect and receive the issues, rents and profits thereof, and during said time, did take and receive, as such bailiff, all the rents, issues and profits thereof, to the use of said M. A. and to render her reasonable account thereof to said M. when she should be thereunto required.

2d Count.—And also whereas the defendant, at Windsor, &c. on the 3d day of May, 1819, was, and from thence until the 11th day of December, 1826, continued to be the bailiff of said M. A., then sole, of certain goods and chattels of said M. A., [here the particular chattels are set forth,] all said goods and chattels being of the value of two thousand dollars ; and during all that time, said Susannah had the care and management of said goods and chattels, to make profit and advantage thereof to said M. A. and to ren-

der her reasonable account thereof to said M. A. when thereto afterwards required.

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3d Count.—Also whereas said S. at Windsor, &c. on the 3d day of May, 1819, was, and until the 11th day of December, 1826, continued to be the receiver of said M. A. then sole, and as such received [here follows a particular of sums received, and by what hands] to render her said S's reasonable account of said sums of money to said M. A. when thereto afterwards requested.

4th Count.—Precisely as the first, laying the time from 12th December, 1826, to 15th October, 1832.

5th Count.—Like the second, laying the time from 12th December, 1826, to 15th October, 1832.

6th Count.—Like the third, laying the time from 12th December, 1826, to the intermarriage of the plaintiffs.

7th Count.—Also whereas said S., on the 15th day of October, 1832, at Windsor, &c., was, and from thence continually to the day of the purchase of this writ, has been the bailiff of said R and M. A. in right of said M. A. of certain lands and tenements, [here follows a description of the same lands,] and during all the time last mentioned, said S. has had the care and management and administration of said lands and tenements, for the profit and advantage of said R. and M. A., and has received the rents, issues and profits of the same, to render a reasonable account thereof, when thereunto required.

Conclusion.—Yet said S., though often required, has ever neglected and refused to render any account to said M. A., before her intermarriage, or to said R. and M. A., or either of them, since their intermarriage, of the time said S. was the bailiff and receiver of said M. A., when sole, and has also neglected and refused to render any account of the time said S. was the bailiff of said R. and M. A., in right of said M. A., unto said R. and M. A., or either of them—to the damage, &c.

Plea.—And now said S. comes and defends, &c., and says, that the court here ought not to take any further cognizance of said action, because [protesting that said plaintiffs are not husband and wife] for plea, she, said S. says, that her former husband, Elisha Phelps, late of W. &c., died at said W., on the 4th day of April, 1819, leaving her, said S. a widow, with several children, their issue, and heirs to the estate of said E. P., the youngest of whom, said M. A., was then between four and five years old;—

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that afterwards, at Cavendish, &c. on the 3d day of May, 1819, she was, by the judge of probate for the district of Windsor, appointed guardian in due form of law, to said M. A., and as such, authorized and required to demand, receive and take into her custody all and singular the property that should come to her in right of her father, E. P., and all other property which should otherwise belong to her, and out of the avails of the same, to provide for the support and maintenance and education of said M. A., and to render to said judge of probate, upon oath, a plain and true account of her said guardianship, when lawfully required, and to pay the said M. A., when she should arrive at full age, such balance as should be found due to her by a settlement of her guardianship account by said judge: as by the original letter of guardianship now here in court, ready to be produced, may fully appear. And afterwards, on the same day, at said Cavendish, said S. having accepted said appointment, executed a bond to said judge of probate, with good and sufficient surety, in the penal sum of five thousand dollars, with condition thereto annexed, that said guardian should well and truly perform and discharge the trust and office of guardian unto the said minor, and that in and by all things according to law; and should render a plain and true account of her said guardianship, upon oath, and of all and singular such estate as should come to her hands and possession by virtue thereof, and of the profits and improvements of the same, so far as the law would charge her therewith, when lawfully required; and should pay and deliver what, and so much of said estate, as should be found remaining due upon her account—the same being first examined and allowed by the judge, &c., unto the said minor, when she should arrive at full age, or otherwise, as said judge, &c., by decree or sentence, pursuant to law, should limit and appoint. And said S. further says, that, in pursuance of her said appointment, she has, during the time of the minority of the said M. A., received the rents and profits of said estate belonging to said M. A., and has laid out the same in the maintenance, support and education of said M. A., and for her best advantage. And that said M. A. became of age on the 12th day of August, 1832. And said S. further says, that she has always been ready, and is still ready to render to the judge, &c. a plain and true account of her guardianship aforesaid, when she shall be thereunto lawfully required. And said S. further says, that she has not at any time since her appointment aforesaid as guardian, received or intermeddled with any of the property of said M. A. otherwise than as guardian as aforesaid; and that since said

M. A. arrived at full age, said S. has not received or intermeddled with any of the property of said M. A. in any manner whatever. And said S. further says, that this honorable court has no jurisdiction in this suit, to compel her to render any account of the subject matter thereof, or to settle or adjust the same; but that the jurisdiction thereof belongs to the probate court, &c., which alone has cognizance and jurisdiction thereof. And this said Susanna is ready to verify, &c.

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Replication.—And now said R. and M. A. to the plea, &c. reply and say, 'That by reason of any thing in said plea contained, the said court here ought not to be precluded, &c. because they say that after the appointment of said S. as guardian of said M. A. in manner and form as, &c. to wit, at Windsor, &c. on the 11th day of December, 1826, said S. took to her husband, and then and there intermarried with one Erastus Torrey, late of, &c., by reason of which said marriage, the right of said S., under said appointment, was extinguished and at an end, without this that said Susanna hath not otherwise than as guardian since her said appointment, or in any manner whatever since said M. A. arrived at full age, intermeddled with any of the property of said M. A., and this they are ready to verify, &c.

Demurrer and joinder in demurrer.

On the trial at the county court, judgment was rendered that said replication is insufficient, and that the county court have not jurisdiction, and for the defendant to recover her costs; from which the cause came by exception to this court for revision.

Hubbard and Aikens for defendant.—Two general questions arise upon the pleadings:

1st. Is the plea to the jurisdiction avoidable without reference to the replication? And if it is,

2d. Does the replication remove and set aside the effects of the plea?

1. We contend that the county court has no jurisdiction to settle this account. 'That it was the intention of the legislature, apparent from their whole legislation, to confine the jurisdiction to the probate court, when the guardianship was granted.

1. This is proper: the inventory and all the papers are there.

2. It would be a hardship to call the guardian into every county in the state.

3. It would be inconvenient, unnecessary and vexatious.

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4. The law has provided in this court a remedy for every possible case that can occur.

1. Guardians of minors appointed till fourteen, and till others are appointed.—See the Letter of Guardianship and Statute, page 356, § 101.—Toll edition, p. 159, 160.

2. Such guardian to account yearly, and oftener if required.—P. 357, § 104, and the Bond, Toll. ed. 160, § 94.

3. And at the full age, the ward may have a remedy on the bond—could have it only in probate court.—P. 357, § 105.—See Toll. ed. 60—may have further remedy—96, 97, 160.

4. All suits on the bond must be in the county, &c.—P. 334, § 12.

5. Probate courts may appoint *new* guardians, after powers of former ones have been decreed to have ceased.—P. 340, § 35.

6. If property of the ward has been embezzled, remedy is in the probate court.

7. At common law, no action of account would lie against any guardian, except guardian in socage.—1 Selwyn N. P. 1. 1 Bac. Abr. 17. Extended by statute—4 Anne, c. 16.

There are three kinds of actions of account :

One against a guardian in socage, as bailiff.

One against a bailiff by appointment, as merchant and merchant.

One as receiver.—1 Bac. Abr. 16. 1 Co. Lit. 172, *a*. 2d Co. 89. And must be declared against as guardian in socage.—1 Lit. Ent. And it must be set forth that he occupied as guardian.—Cro. Cha. 229. So by one tenant in common against another.—Willis Rep. 208. And if declared against as bailiff, it must be taken as bailiff by appointment.—Willis Rep. 210.

Account against one as receiver, when it should be as bailiff, is bad.—2 Lev. 126.

A man shall not be charged in account as surveyor, apprentice, reeve nor as heyward.—Co. Lit. 172, *a*.

And to maintain an action of account, there must be a privity in deed by consent of the party, for against a disseizor or any other wrong-doer, no account lies—or a privity in law, as against a guardian in socage.—Co. Lit. 172, *a*. Willis, 208.

A man cannot be charged as bailiff and receiver, at common law, except by appointment.—1 Co. Lit. 200–6, § 323.

A guardian shall not be charged as receiver, for a receiver shall not be allowed his charges and expenses.—Co. Lit. 72, *a*.—note 75 to 82, *a*.

So a receiver shall not be charged as bailiff, nor a bailiff as receiver.—1 Com. Dig. 117.

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No action of account was ever sustained against a guardian by appointment. In England and in New-York the appointment belongs to the court of chancery. In this state, and in the New-England states generally, the appointment is made by the court of probate, and the account must be settled when the appointment is made.

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In New-York, no action will lie between guardian and ward, till the account has been settled in the court of chancery.—19 John. Rep. 304.

In New-Hampshire, no such action can be maintained till the account is settled in the probate court.—2 N. H. Rep. 395.

It has been said that no action of account would lie at common law against a guardian, except a guardian in socage.

A guardian in socage what Co. Lit. 86 a. socage tenure consisted of free and honorable services, and were liquidated and reduced to a certainty.—2 Bla. Com. 78, 79.

And a guardian in socage is he who is next of kin to whom the land cannot descend.—1 Bla. Com. 461. Co. Lit. 123.

And it ends at 14 years.—1 Bla. Com. 461. Co. Lit. 123.

And they are called guardians at common law.—1 Bla. Com. 461.

And it devolves upon the person designated by law, as the title descends upon the heir. And on action of right of ward lies to determine who is entitled.—2 Mod. Rep. 177.

No such guardians in this state—no such tenure.

Our statute does not extend the action of account to any guardian (See Comp. Stat. 141) except over persons for excessive drinking (p. 374-6) and to children whose parents have absconded, &c. (Stat. 377) who are required to account with the selectmen, (384).

Account against a bailiff of a manor or land, must be in the county where the land lies.—1 Com. Dig. 163. 2 Inst. 231. Also,

1st. Actions of covenant running with the land.

2d. Bills to foreclose mortgages.

3d. Or others that have respect to land.

2. Does the replication remove and set aside the effects of the plea?

The replication sets forth that the said guardian was married to Doct. E. Torrey, Dec. 11, 126, which is admitted by the demurrer.

We contend that the replication does not avoid the plea.

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It is contended by the plaintiff, that the powers of the guardian ceased on the marriage.—See Statute p. 340—also Statute of 1816, p. 146.

But to have that effect there, must be a decree of the probate court to that effect, and the appointment of another guardian.

The true construction of the clause is, that the probate court, to make a decree that the powers of the guardian cease, would require no proof but proof of the marriage.

If the guardian continues to discharge the duties of her appointment, to receive the estate of the ward, to expend it in the maintenance and education of the ward till of age, is not the guardian chargeable? And is not the bond a security for the whole time? We contend that it must be so understood.

Shall the guardian, by her own act, avoid her liability? And shall the surety avoid his by remaining silent? We contend not.

It is in the power of the surety, by making the representation to the probate court, to protect himself in various ways, by avoiding the guardianship and having a new guardian, or by representing himself in danger and obtaining other sureties.

What would be the condition of the estate in such case? And the ward—is she without guardian? her estate without security, or any one to take care of it? We think not.

The settlement of the account cannot be divided: it must be settled at once, and before the same tribunal.

And when the ward comes of age, the guardian must render an account, and pay the balance found due by the probate court.—See Letter and Bond.

Guardians are appointed till 14, and till others are appointed.—Stat. p. 356; Letter of Guardianship.

Probate courts may appoint *new* guardians, after the powers of such guardians have been decreed to have ceased.—P. 340, § 35.

So in the case of a guardian in socage, if he receives the profits of the estate after the age of 14 years, he shall be charged as bailiff for the whole time.—1 Com. Dig. 117. 2 Cro. 219. Coke Lit. 90, a.

Besides, after the marriage, the guardian was a *feme covert*, and could not be bailiff, nor make one.—3 Vt. Rep. 485, 493.

And the ward was a minor, and could not make bailiff, nor could she be bailiff.—1 Co. Lit. 172, a.

The defendant entered upon the duties of her office as guardian, and having so entered, she could not be so charged in account.

One who entered as executor, and took the profit as such, cannot be charged in account.—Dyer Rep. 277, pt. 59.

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Account does not lie against an executor or administrator, but only by one against another; and the administrator's account must be settled in the probate court.

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So if a guardian be appointed, the whole account must be settled in the probate court, and for the whole time: it cannot be divided.

Suppose it not settled for several years, and the property continues in the hands of the guardian, he still must account.

The guardianship is void *only* for the purpose of appointing another. And would the probate court decree the guardianship void till another was ready to be appointed?

Generally, a man who receives a certainty, cannot be charged as bailiff, as if a person be appointed to receive the rent of a manor, which is in lease at a certain rent.—1 Com. Dig. 117. 2 Cro. 219. Co. Lit. 90, a.

William C. Bradley for plaintiffs.—The three first counts charge the defendant, 1. As bailiff of lands, 2. Of goods, 3. As receiver of money for a time, [which proves on computation from the pleadings to be from the taking of guardianship to the marriage of guardian, 7 years, 7 months, 9 days.) The next counts charge her in the same way, for a time extending from the marriage of the guardian [1 year and 8 months to the minor becoming 14 years old, then 4 years until the minor's full age, then 2 months and 3 days, making 5 years, 10 months, 3 days] to the commencement of the action,

Plea in abatement setting up that defendant was probate guardian of the *feme* plaintiff, from the time set up in the beginning of the three first counts to her full age, and has not since intermeddled otherwise with the property of the *feme* plaintiff, and therefore the jurisdiction of the cause of action is in the probate and not in the county court.

Replication that the defendant took husband at the time which is stated, at the beginning of the fourth count, and traversing the non-intermeddling.

Demurrer and joinder in demurrer.

Plea in abatement is bad.

1. Because it sets a guardianship defective on its own shewing under the stat. of 1797, which was in force in 1819, and though now repealed, yet all the rights and remedies accruing under it

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saved. (Revd. Law, p. 358, § 110.) By the statute it was made a pre-requisite that a certain bond should be taken, i. e. the judge was empowered to allow and appoint guardians, "taking sufficient security of all such guardians, for the faithful discharge of their trusts. And to account either with the judge or minor when such minor should arrive at full age, or at such other time as the judge on complaint to him made should direct. The plea sets forth that the defendant executed a bond to the judge, with good and sufficient surety in the sum of \$5000, with condition thereto annexed, that he should well and truly perform the trust according to law, and should render a plain and true *account* of her guardianship upon oath, and of all and singular such estate as should come to her hands and possession by virtue thereof, and of the profits and improvements of the same so far as the law would charge her therewith when lawfully required, *and should pay and deliver what and so much of said estate as should be found remaining due upon her account, the same being first examined and allowed by the judge or judges, for the time being of the probate of wills and within the said district unto the said minor when she should arrive at full age, or otherwise as the said judge or judges by his or their decree or sentence, pursuant to law should limit and appoint.* This bond differing from the one required by the statute of 1797, is not well set forth; and as the character of the defendant's trust is to be determined by that act under which the plea supposes the lands, goods, and chattels to have been delivered to her, she is not at liberty to shift it into another form by such plea. It is to be observed that the act of 1821 makes no express provision for accounting at full age, but only annually.—Probate acts of 1797, § 93—1821, § 110.

2. The plea admits the receipt of the rents and profits of lands of the *feme* plaintiff during the minority as guardian, without traversing her being bailiff or receiver, during that time or the rest of the time covered by the declaration.—1 Com. Dig. 99, 100.

3. The plea does not admit the custody of the goods and chattels, nor deny it otherwise than in an argumentative manner by saying that she never received or intermeddled with the property *except* as guardian, nor does it traverse her being bailiff and receiver thereof.—1 Com Dig. 100.—1 Went. 15.

4. The 7th and last count remains wholly unanswered, for it charges her as bailiff of *both* plaintiffs, and the denial of intermeddling, &c. is confined to the property of *feme plaintiff alone*.

5. The guardianship is set up as a defence during the whole mi-

nority, and the rent and custody of the lands, goods and chattels is admitted by the plea. The termination of the guardianship by a marriage, during the minority, destroys the defence.

6. A mere readiness to account is set up which is not sufficient.

7. The plea after all, if otherwise well plead, could only amount to the common issue of never bailiff and receiver, and therefore ought to be in bar and not in abatement to the jurisdiction.—1 Com. Dig. 99.—1 Chitty, 430, 432.

A guardianship from the probate created under the statute of 1797, if entirely regular and well plead does not of itself prevent the jurisdiction of the law courts in an action of account at common law if brought after the minors have come to full age.

This leads to an examination of the appointment or creation of guardians, their duties and remedies, which their wards have against them in England and in this state.

Guardians in England, as by the civil law, were created by the appointment of the parents, by the appointment the courts, and by the disposition of law, called by the civilians testamentary, dative and legal.—1 Brown. Civ. Law, 130.—Har. notes on 88 and 89, folio of Co. Litt.—Fonb. 503, n.

Guardians by appointment of the parent were unknown to the common law, and except a slight disposition of daughters conferred by the statute of Philip and Mary, is derived from the statute 13 and 14 of Car. 2 Harg. notes, 69,—1 Mad. Chan. 265.

Guardians by appointment of the courts were guardians in chancery, guardians in the ecclesiastical courts and occasional appointments in the courts of law.—Harg. n. 70.—1 Mad. Chan. 262.—1 Swinb. 212.

In chancery the power, notwithstanding the controversies, seems fairly derivable from the civil law, which required the guardian to make inventory, to faithfully administer, to give ample security, to account or be liable to the suit of the minor when he become of age.—1 Br. C. L. pp. 134, 135 and 10.—2 Kent's Com. 186.—Fonb. 521, note, 10.

In the ecclesiastical courts appointments were made through a power derived from that head in the code entitled, "the pontifical jurisdiction," and the requisites were the same, but it was confined to personal property only.—1 Swinb. 217.—1 Br. C. L. 135, n. 10.

Guardianship by the disposition of the common law, [if we disregard military and customary guardianship,] was either of the person only, or of the person, lands and hereditaments. Of the person it was either by nature as the parents of the heir apparent till

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Nor did it lie for or against executors or administrators, because the receipt was neither by nor for them, nor was the privity of accounts between them and the party, but between the party and the deceased.—Co. Lit. 89, *b*.

But it has since been given by the statute for a particular part only, and not for all possible recoverable profits: therefore, no occasion to mention guardians in the statute, they being already liable fully.—1 Bac. Abr. 52.

It has already been observed, that the action lay against the real guardian in socage as guardian, and not otherwise. It may be added, that if being such, he was sued as bailiff, he might plead that he was guardian, and not bailiff; and on the other hand, if being bailiff, he was sued by the name of guardian, it would be equally defective.—1 Com. Dig. 99. Fonb. 118, *a*. & *b*.

But it has been said, that the guardian in socage, after the minor had arrived to the age of 14 years, might continue the custody, and that in such cases, though sometimes called guardian, yet not being in socage, which could not extend beyond 14 years, such persons would technically be only bailiff, and for the period after the age of 14, must be sued as such.—2 Inst. 380. 1 John. Cas. 217.

But in cases of the last description, the action may be brought entire, in which cases the guardian is declared against as guardian and bailiff.—Lit. Ent. 13. Ri. Prac. B. R. 44.

So too, if one should enter upon socage lands, claiming to hold them while the infant was under 14, by a different guardianship, (chivalry for instance,) the heir might elect to hold him as guardian in socage, or as bailiff only.—Fonb. 118. Hallis, note *a*.

So too, if relations occupy lands holden by purchase, and therefore not in socage, they were liable in an action of account as bailiffs of those lands.—Fonb. 117, *b*. Cro. Car. 306.

And as within the 14 years, any other custody than that of guardian in socage shall make the holders liable in account, so it is said generally, that whatever occurs to charge the accountant after the expiration of the 14 years, the heir shall have his action of account against him as bailiff, and not as guardian.—Lit. § 124. Co. Lit. 90, *a*. Fonb. 118, *b*. Cro. Jac. 219.

So any one entering upon the lands of an infant, whether as kin, next friend, or even intruder, creates a privity by taking the profits, and shall be liable in an action of account.—Co. Lit. 90, *a*. 1 Vern. 295. 1 Bac. Abr. (Wilson's) 419. 1 John. Cas. 217. Cro. Car. 303, 306. 2 P. Wm's, 645, *Bonnett. vs. Whithead*.

Or one receiving the profits during infancy, and continuing to do so after the ward comes of age.—3 Bac. Abr. 419.—1 Eq. Abr. 7—same, 280, *Gallop vs. Hobrathy*.

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But it is to be observed, that the guardian or bailiff is not liable to be sued in account by the infant, until the wardship is terminated, i. e. in the case of socage guardian, until the ward has arrived at the age of 14 years, and in all the other cases to the age of 21. Har. 12, 72. 1 Root. 51, *Robertson vs. Robertson*.

And that accounting he shall have all his reasonable allowance and expenses.—Co. Lit. 89, a. 14 Vin. 186.

The result of these authorities is, that if the defendant held the custody of the estate, &c. for the infant, and received the profits for her benefit, she is liable, at common law, in the action of account, the only difference being that if the socage tenure and guardianship in socage exists in Vermont, and she was such guardian, and *had so pleaded it*, (14 Vin. 199) she would not be liable in the present action for the profits of the socage lands while the minor was under 14 years, otherwise she would be liable as bailiff for the whole time, unless the action of account is taken away in this state.

It is not pretended that such is the case, i. e. account taken away *generally*. Indeed, it was very early established by statute, having been copied into our laws in 1782, from the old Connecticut compilation, before mentioned: It is also in use in Massachusetts and in New-York, but not in New-Hampshire, where the legislation is peculiar, allowing the supreme court, where necessary for certain purposes, to appoint auditors, whose report is read to the jury as evidence.—Con. Laws, (old ed,) p. 10. Slade, 486. 1 White's Digest, 63. 2 Kent, 188. L. of N. H. 177.

It is not particularly taken away by any express words of the statute, nor by implication arising from any particular words: On the contrary, it seems to reserve it; for in the bond prescribed to be taken from the guardian, by the statute of 1797; which in this respect is similar to those of 1787 and 1779, it is a condition that the guardian shall account *to the judge of probate, or the minor* when he comes of full age. The one accounting being in the probate court—the other the separate claim of the party, and which, if all the accounting was to be in that court, would be surplusage.—Probate Act of 1797, § 93.

Nor does the taking of the bond supersede the action of account. It is not of a higher nature: account being the concurrent remedy where the contract is under seal, as between partners. Where

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there is a covenant to account, the action may be either. Beside, it was adjudged as early as 28 Ed. III. that where a bond was given, the condition of which was to render a faithful account of profits, &c. that the plaintiff might have his action of debt or account.—Ch. J. Treby, notes. Dyer, 22.

So too in the case reported in Dyer, (same page) which was a bond acknowledging the receipt of £20, and conditioned to lay them out for French prunes, for the use of the plaintiff, it was adjudged by three judges that the plaintiff might have debt or account at his election; but Montague held that it should be account only. Dyer, 20—same, 152 and note.

In Connecticut and Massachusetts, where a bond exactly similar is taken, it has been adjudged that the guardian is liable in an action of account.

In New-York, where security is taken by the surrogate, it is also laid down that the guardian is liable to an action of account at common law, by the infant, after he comes of age. This question would not arise in New-Hampshire, where the action of account does not occur, and where there is considerable difference in the statute bond.—1 Swift's Dig. 580. 2 White's D. 648. 12 Mass. Rep. 152, *Sargent vs. Parsons*. 2 Kent, 186, 188. Reeves' Dom. Rel. 322. 3 Gill & Johnson, (Maryland) 389. American Jurist, vol. 11, p. 117.

Nor is it for the public benefit that the jurisdiction should be withdrawn from a court with full power, and where this account can be conclusively and finally settled in one proceeding, and conferred upon a court of limited jurisdiction, which has no power of enforcing the account, and where, if the accounting takes place, it is not even conclusive in a suit upon the guardian's bond.—Prob. Act, p. 357, § 105. *Spedden vs. State*, 3 Harris & Johnson, 251.

The probate court can only take bond from the guardian who holds under its appointment, and to enforce the due performance of the office conferred by that court, it having jurisdiction over no other. When, therefore, that office ceases, the probate court cannot call to account for any thing which takes place afterwards.—Here the marriage of the guardian having by express statute extinguished all right under the probate appointment, the ward would be without remedy for the profits made subsequently.

Nor need the marriage be first proved or certified in the probate court, any more than the death of the guardian. Like forfeiture by statute, whenever and wherever the fact is proved, the extinguishment takes place from the date of the fact; otherwise, inextricable

confusion would arise in the suits which the guardian might commence for the property of the ward.

The bond taken in the probate court (may be as in the present case) for a sum less than the property shall eventually prove to be worth, and as no more can be recovered on the bond than the amount, the action of account is a necessary remedy. It is no answer to say, that more security can be required in the probate court; for if the guardian has got the property, will he give the security? Beside, the guardianship may have terminated before the surplus is known.

It has been decided, that whether the guardian is appointed by one having authority for that purpose, (as testamentary guardians in England, who give recognizance) or by operation of common law, the obligations and remedies are the same both in law and equity.—1 P. Wm's, 704, *Duke of Beaufort vs. Beety*. Vaughn, 179, *Bedell vs. Constable*. 3 Bac. Abr. 406. 3 Jacobs' L. Dic. 217. 3 Atkyns, 625.

The rule is, that if the guardian has once accounted fairly and fully, he may plead it in bar of the action, but that he could have accounted elsewhere, is no defence.—1 Corn. Dig. 100.

Nor is the guardian, by the action, deprived of his privilege of allowance; nor is the difficulty of proving them even enhanced, being entitled to the same privileges and on the same evidences before the auditors that he could before the judge.—1 Caine's, 96.

In regard to the particular proceedings in the probate court, such as inventory, partial accounting, &c. they are the same as in the states of Massachusetts, Connecticut and New-York, where the action is allowed.—Stat. *ut supra*.

That the suit on the bond must be brought in the county where taken, does not affect the action more than in other suits where the plaintiff has his election, as *tress. quare*, for cutting and carrying away timber, must be brought in the county; but *de bonis* and trover for cut timber may be brought by the same plaintiff in his own county. So too ejectment in the county, but bill of foreclosure elsewhere. Beside, as the auditors are appointed by the court, the convenience of the parties as to locality may be consulted if necessary.—1 Bac. Abr. 57. Stat. Ver. p. 72, § 48—Ib. p. 141, § 1.

Moreover, if there should be some inconvenience, it is not for the court to balance them, especially when the question is not whether a defendant may, if he prefers it, settle with the judge in the

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county where the judge lives, which after all may in many cases be that of neither party; but whether, when he wholly neglects and refuses to settle at all, he may avail himself of his own wrong to prevent the plaintiff from seeking his right, agreeable to the long established usages of law.

The opinion of the court was delivered by

COLLAMER, J.—This is a plea to the jurisdiction of the court, insisting that the defendant was guardian, and that the whole jurisdiction in relation to her guardianship is exclusively in the probate court. The replication avers, that the defendant ended her guardianship by marriage, in 1826; and to this, the defendant demurs. This is not an objection to the *form* of the action, and it is therefore unnecessary to decide whether either or all of the counts should have been against the defendant, as *guardian*, or as *bailiff*; or to inquire whether that part which relates to the land should have been in Windsor county, for the plea does not insist on such a jurisdiction in Windsor county court. It is also unnecessary to inquire whether all of these counts can be sustained; for if any one of them can, under the circumstances stated in the plea and replication, then this plea to the jurisdiction must fail. In all pleas to the courts of general jurisdiction, it must be shown that there is another court of exclusive jurisdiction, in which effectual justice, to the full extent to which the plaintiff is entitled, may be administered. 1 Chit. Plea. 432, and the authorities there cited.

If the defendant's marriage did immediately, by operation of law, put an end to her guardianship, in 1826, and yet she continued to receive the rents and income until the full age of the ward, or until the commencement of this suit, the plaintiffs could not have entire remedy in probate, and this action must be sustained, or the plaintiffs are without redress, at least in relation to that part subsequent to 1826.

The counsel for the defendant insist, that inasmuch as the defendant's marriage was not noticed in the probate court, and she continued to act, she was still legal guardian. It is insisted that the probate court must pass on the subject, and find the marriage and decree on the subject, and that it is like the death, or incompetency, or removal of one joint administrator. The statute on these two subjects is entirely different. By the 34th section of the act constituting probate courts, it is provided that when any executor, administrator or guardian shall reside without the state, or neglect to account on proper notice, or neglect to perform any decree of said

court, or shall abscond or become *non compos mentis*, or otherwise incapable or unsuitable to discharge the trust, such court may decree their powers to cease. By the 36th section, it is provided "That when a *feme sole*, appointed executrix, administratrix, or guardian, shall marry, *such marriage shall extinguish her right*, under such appointment."

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By the 35th section it is provided "in all cases where the executor, administrator or guardian shall die, or where the probate court shall decree that their powers shall cease, or *their right be by law extinguished*, such court shall have power," &c. to grant power to others. This collation of the provisions of the statute, shows obviously that in relation to a number of causes of incompetency, the statute empowers the court to pass upon them, but the trust does not cease until the court so decree. It is also apparent that it is contemplated vacancies may exist in three modes, to wit: 1, death—2, where the court decree the trust to cease, and 3, the right *being by law extinguished*. And it also appears that the marriage of a *feme sole* guardian is of the last class. *Such marriage shall extinguish their right*. Whether the trust and power shall survive on the death of a joint administrator, is a case on which the probate court is to decree. The statute seems clear and explicit, and safety and expediency would appear to sustain this view. By marriage, the wife passes under the control of the husband, and becomes incapable of keeping the effects of the ward separate from those of the husband. She has contracted a relationship of legal dependence, inconsistent with her trust, and for which her bail cannot be holden. She cannot even sue for the debts of her ward, without joining her husband, and then the judgment would survive to him. That a course so fruitful of incongruity is to arise or continue, because the probate court does not take official cognizance of a marriage of which it has no means of knowledge, is both against the express provision of the statute and common safety and security. The defendant's right and power as guardian, ceased upon her marriage in 1826. For the use and income after that time, the probate court could not *compel* account, and it therefore follows that the county court had jurisdiction of this cause. Here we might dispose of this question; but as the entire question has been argued, and the parties consider a full decision not only important to general practice, but to the ultimate decision of this case, the court proceed further.

Can this action be sustained for an account of those things which were done and received by the defendant within her powers of

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guardian. The only guardian known to the common law, who had the custody of estate, was that of guardian in socage. Guardians by nature, and for nurture, and in chivalry, only extended to the person. Against the guardian in socage, account could be sustained, declaring against him as guardian, and in that way only. It is now argued from this, that the action could be sustained against no other. This does not follow, for no other was then known. It fully appears that if any person got into possession of the heir's lands, and used them as for him, and not in their own right, the action of account could be sustained against him as bailiff. Therefore, this action could have been sustained at common law. Perhaps it is in analogy with the ancient common law, sustaining account against the only *guardian known to that law*, that the courts in this country, considering the common law as having an elastic and expansive principle, adapting itself to the exigencies of society, have sustained this action against such *guardians as are known to our laws*. This analogy would be perfect if the declaration were against them as guardian, not bailiff. The defendant here seems to insist on abatement on the same matter on which a guardian in socage insists, when sued as bailiff, that is, that he is not sued in his right capacity; but goes further, and insists that no action in any form can be sustained in the common law courts. This seems to be insisting on the privilege of a guardian in socage, and yet disclaiming his liability.

Again, when a guardian in socage held beyond his ward's arrival at the age of 14 years, the action could be sustained against him as bailiff. This the defendant has done by holding beyond the termination of her guardianship, her marriage. But inasmuch as all persons, even intruders, who used the ward's estate for the ward, were subject to this suit as bailiff, and none could excuse themselves but guardian in socage, this defendant must be liable.

It is however insisted that when the guardianship is by appointment and not by descent, as in socage, there the action cannot be sustained. To sustain this doctrine, no decision is produced, not even in relation to testamentary guardians under the statute of Charles II., nor as to guardians and tutors appointed by the ecclesiastical courts in England, before that period; nor in relation to guardians in chancery. That such actions do not appear in the books against such *guardians*, may be ascribed to two reasons: 1st, If such suits were brought, they would be against them as bailiffs, as already shown.—2d, Matters of trust and account went

into chancery. This, however, did not repeal the action of account, and it has always been left on foot in this country. We are therefore not furnished with a single English decision that this action would not be there sustained, even for a guardianship by appointment.

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Can it be sustained where the guardianship is not only by appointment, but appointment by a board having power to compel an account, and possessing an entire system. In Connecticut, where the probate court appoint the guardian, take bonds, and can compel an account, a system as entire as ours, it fully appears that after the termination of the guardianship, the *action* of account is sustained. So it also appears in Massachusetts. In New-York, where a surrogate may appoint a guardian, taking bond or the chancellor without, and where all is a perfect system of accounting in chancery, still it appears that at and after the termination of the guardianship, the ward may have an action of account at common law, and the court of chancery does not enjoin or interfere with it. This never extends to intermediate accounting.

However much we are inclined to confine parties to a single tribunal, and not to increase the already arduous duties of the county courts, and whatever might be our views of convenience, we feel constrained, from these principles and authorities, to hold that this action of account may be sustained, after a guardianship ceases, for what transpired under it.

It is not to be disguised, that the probate court is not clothed with *all* the power wanted for the accomplishment of the object of this action, the power of compelling an account and enforcing the collection of the balance found due, but more especially giving judgment for what accrued after the termination of the guardian's life.

Judgment reversed, and the defendant to answer over.

CASES IN THE SUPREME COURT

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STATE vs. TOWN of WHITINGHAM.

A town is liable to an indictment for not erecting a bridge, ordered by the road commissioners.

It is not necessary, in such indictment, to set forth that the selectmen had, previous to such order, neglected to build such bridge.

Where an appeal was taken from the decision of the road commissioners, and a committee appointed by the county court. such committee were not required to make any new order, but only to reverse or affirm the order of the commissioners.

Indictment for not building a bridge ordered by the road commissioners. The indictment read as follows :

“ That on the 29th day of April, A. D. 1829, upon the petition of Zachariah Wheeler, and more than twenty others, inhabitants and freeholders of Whitingham and vicinity, in said county of Windham, to the road commissioners for said county, who were duly appointed and sworn into office, it was by the said road commissioners (after due notice given to the selectmen of said town of Whitingham) ordered and adjudged that a bridge be erected and established across Deerfield river, within said town of Whitingham, beginning in the centre of Mill-Brook Road, so called, on the easterly bank of said river, one rod from the beech-tree standing on the bank of said river, marked on a course, south thirty-four degrees west from said beech-tree, running from thence west forty-six and a half degrees north, till it intersects the road on the west side of the river, leading to Readsboro’ ; and that the said town of Whitingham should within one year from the first day of November then next, erect and build across Deerfield River, at the place before mentioned, a good and substantial bridge, at least sixteen feet wide ;—and after the making said order and adjudication, the same was duly recorded in the office of the town clerk of the town of Whitingham aforesaid ;—and the jurors aforesaid, on their oath aforesaid, further present, that within twenty days from the time of making said order and adjudication, the selectmen of said Whitingham demanded of the clerk of said road commissioners an appeal from said order and adjudication ; and such proceedings were thereupon had, that Martin Field, William H. Williams, and Edward Houghton, a committee appointed by the county court, begun and holden at Newfane, within and for Windham county, on the third Tuesday of September, A. D. 1829, agreeable to the statute, on the 27th day of September, A. D. 1829, in all things affirmed said order and adjudication of the road commissioners aforesaid, and thereof made report

to the town clerk of Whitingham aforesaid, and caused the said report to be recorded in his office, and made a like report to the clerk of said road commissioners, and the same was by said clerk duly recorded. And the jurors aforesaid, on their oaths aforesaid, further present, that although the time designated in said order of the road commissioners, so offered as aforesaid, hath long since closed, to wit, on the first day of November, A. D. 1830; yet the town of Whitingham aforesaid, not regarding said order, hath not built and erected, nor caused to be built and erected, any bridge across Deerfield River at the place designated in said order, nor have the selectmen of said Whitingham, built and opened a bridge according to the direction of said order. But on the contrary, the said town of Whitingham, from the date of said order, and continually afterwards, until the day of taking this inquisition, have neglected to erect a bridge across Deerfield River, within said town of Whitingham.

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Plea—General Demurrer.

Mr. Keyes for defendant.—1. The demurrant contends, that the indictment does not set forth sufficient matter on which to ground a conviction.

In counting upon the doings of inferior tribunals, all those facts must be averred which are necessary to exist to give such tribunals jurisdiction.—4 Mass. Rep. 361.—7 Mass. R. 79.—9 Mass. R. 543.—11 Mass. R. 507.

It appears from the indictment, that the road commissioners undertook to locate a bridge, which was exclusively within the jurisdiction of the selectmen, and the proceedings were *coram non jure*.—Stat. 1827, p. 13.—Stat. 1806, p. 437.

The indictment shows no existing order upon the town for the making said bridge. The appeal vacates the order of the road commissioners, and no order was afterwards made.—Statute 1828, p. 9.

2. The neglect of the town to build the bridge, is not an offence for which they are liable to indictment.

Roads and bridges are creatures of the statute, and the statute authorizing them is intended to be a complete system, and varies the common law.—*Royalton vs. Fox*, 5 Vt. R. 458.

But the statute in existence at the time the bridge was laid, applied the remedy, which was new and unknown to the common law.—Stat. 1827, § 6.

When a statute makes a new offence, not prohibited by the com-

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mon law, and appoints a particular proceeding against the offender, without mentioning an indictment, the remedy by indictment does not lie, because the mentioning the other remedies impliedly excludes the indictment.—Hawk. P. C. chap. 25, § 4, p. 211.—2 Keb. 34 & 273.—Cro. Jac. 643.—2 Roll. Rep. 247. *Rex vs. Robinson*, 2 Burr. Rep. 805, & 803.—*Rex vs. Royal*, 2 Burr. Rep. 834.

Indictments for such offences are not consistent with the genius of republican governments; and even the courts in England frown upon indictments where there is another remedy.—*Rex vs. Robinson*, 2 Burr. Rep. 804.—*Rex vs. Royal*, 2 Burr. Rep. 834.

In the present case, there is ample provision in the statute of 1832.—Stat. 1832, p. 7, § 2.

If it be said that where the statute appointing a particular remedy is in a different section from the section imposing the duty, either the particular remedy or the indictment may be resorted to, we answer, in the present case, no duty is imposed on the town except what the section giving the remedy creates.—*King vs. Harris*, 4 T. R. 202.—2 Hale P. C. 171.

If it be said the repeal of the road law, in 1831, revived indictments, we say, the repeal could not revive what never before existed, neither can indictments arise by implication.

Again, at the time this offence was committed by the town of Whitingham, the road commission law was in force. By the 9th section of that law, it is provided that hereafter no presentment or indictment be had against any town for not making or repairing any highway or bridge laid or ordered to be made by said commissioners.—Stat. 1827, § 9, p. 15.

Therefore the statute of 1831 (or any law that the legislature could pass) if construed to permit indictments for such offences, would be *ex post facto* and void.—Constitution U. S. art. 1, § 10.

The case in fifth Ver. Rep. in principle settles this case.—*Royalton vs. Fox*, 5 Vt. R. 458.

Mr. Field and Mr. Bradley for the State.—1. The first objection at the court below was, that the indictment (which was for not obeying an order of road commissioners) did not show that application had been made to the selectmen before the petition was made to the road commissioners. To this it is answered, 1, That *that* fact need not be averred in the indictment, but will be presumed to have existed. 2. That by not pleading it before the commissioners, or at the county court, on the appeal, all advantage from the

want of such previous application, has been waived ; and, 3, That at any rate, the order cannot be impeached for such cause in this proceeding, but must be avoided, if at all, by *certiorari*.—See *Rowland vs. Veale*, Cowp. 18. *Belk vs. Broadbent*, 3 T. R. 185. 1 Saunders, in note, 92.

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2. The second objection was, that the statute of 1806 prescribes a different remedy, which must be pursued ; and that an indictment will not lie.—Stat. 437.

To this it is answered, that the indictment is good at common law, and is not affected by that statute.—See *Rex vs. Belme*, Cowper's Rep. 648. 2 Burr. 799. 4 T. R. 205. 8 East. 41. Also 2 Chit. Crim. Law, 139, note.

The 5th section of the act of 1806, expressly saves the remedy by indictment. It is also contended, that the liability under the order was cast not on the selectmen, but upon the town, and that no penalty is incurred by the selectmen in not complying with it ;—consequently, if this remedy by indictment does not exist, there is none whatever, and the repealing act of 1831, which expressly saves the liability, has left the public without any remedy to enforce it.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The indictment sets forth, that on the 29th day of October, 1829, an order was made by the road commissioners for the county of Windham, that a bridge should be located and established in the town of Whitingham, across Deerfield River ;—that the town should make it in one year ;—that an appeal was taken from this order by the town—a committee appointed by the county court, in pursuance of the statute, who affirmed the order of the commissioners, and that the town have neglected to make the bridge, agreeably to the order.

To this indictment there is a demurrer. It is objected to the indictment, that if the town is liable to a proceeding of this kind, yet that the indictment does not set forth sufficient matter—as it is not alleged that the selectmen had refused or neglected to build a bridge, and further, that no existing order upon the town is set forth, inasmuch as it is contended, that the order made by the commissioners was vacated by the appeal, and no order was afterwards made.

Upon the first of these exceptions, it is sufficient to remark, that the commissioners had, by the statute then in force, general jurisdiction over the subject of roads and bridges. If they proceeded

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irregularly, or in a case where there had been no neglect or refusal by the selectmen, their proceedings were subject to be quashed on *certiorari*. That in an indictment against a town for not complying with an order made by the commissioners, it is not necessary to aver the neglect or refusal of the selectmen; but from the commissioners' having this general jurisdiction, it is to be presumed, that the selectmen had so far neglected, as to render their action necessary.

On the second objection, it is to be observed, that an appeal does not so far vacate an order of the commissioners, as to render a new order, by the committee, appointed by the county court, necessary. The original order of the commissioners must contain all the directions necessary to effect the object; and this order is to be affirmed or reversed *in toto* by the committee. The committee could make no new order, nor add to, or alter the one made by the commissioners. On the most material question, whether an indictment can be maintained in such a case, it is to be remembered, that the general principle applicable to this subject, which we find, is this: that disobedience to an order of sessions, (who in England regulates the subjects of highways as well as others) is an offence indictable at common law. Where the court of sessions, or any other tribunal, are empowered to impose a duty on any corporation or individual, which affects or interests the public, a neglect to perform that duty, subjects those neglecting, to an indictment.

In *Rex vs. Davis*, mentioned in 2 Bur. 803, it was said, where two justices were empowered to remove a pauper to the place of his last settlement, but no provision was made by the act to punish the officer who should refuse to receive the pauper, the only remedy was at common law, to indict him.

In *Rex vs. Robinson*, 2 Bur. 799, where an order was made upon a man for keeping and maintaining his 'grand-children, and he refused to obey the order, it was held that an indictment lay, notwithstanding there was a particular penalty, and a summary way to enforce it.

In *Rex vs. Royall*, 2 Bur. 832, an indictment was sustained against the defendant, for not sending a cart and men to labor on the highway, in pursuance of an order of the surveyor of the highways. All these were indictments at common law, and sufficiently show that this is the proper and appropriate remedy to enforce obedience to an order of sessions, in relation to a public duty or burthen. The question then will arise, whether the order set forth in this indictment is of that character, that a town neglecting to obey

it, is liable to indictment at common law. That the order is by a competent tribunal, and that the burthen or duty affects the public interest, is unquestionable; but whether the towns are not exempted from indictment, or whether an indictment would ever lay against a town for not building a bridge, is to be learnt from the various statutes on this subject, comparing their provisions with those of the common law.

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In the first statute in relation to highways, passed in 1797, no provision was made for building bridges. Bridges were considered as part of the highways, and if out of repair, the towns were liable to be fined, if any special damages accrued to individuals, from the insufficiency or want of repair of the public bridges or highways.

In November, 1806, an act was passed in relation to bridges.—Wherever a bridge was wanted, application was to be made to the selectmen by twenty freeholders, by the first of May in each year: If the selectmen refused to build the bridge in six months, application might be made to the county court, who, on the report of a committee, might make an order on the selectmen to build the bridge within such time as they should appoint. The selectmen were authorized to build such bridge, and raise money for that purpose by tax, without vote of the town, and to insure their compliance with the order, they were liable to a fine of five dollars a month for every month's neglect to build the bridge. As the selectmen had ample and sufficient power for the purpose, this penalty was sufficient to induce them to do their duty, and was sufficient for the purpose. So far the towns were not liable to an indictment, as the burthen was cast upon their officers, and the subject was out of their control.

In the statute of 1827, under which the order set forth in this indictment was made, the law on the subject of roads and bridges was wholly altered. The road commissioners were empowered to make the order which had been previously made by the county court, and could assess and collect money sufficient to carry the same into effect. This act expressly declares, that the towns shall *not* be liable to indictment. It is to be observed, that under this statute, the orders, decrees, &c. of the commissioners were to be made on the towns, and not on the selectmen; and the remedy provided was by collecting the fine or assessment to build the bridge, directly from the town. Under this statute, the proceedings had by the road commissioners, against the town of Whitingham, so far

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as respects locating and establishing the bridge, and directing how and when it should be made, were complete, but the remedy was not enforced.

In 1831, the act of 1827 was repealed ; but in the repealing act, there was a provision that it should not affect any liabilities already incurred. All remedies provided by the act of 1827, were, however, abolished by the repealing act of 1831. The proceedings had in relation to this town on the subject of this bridge, were then in this situation ;—there was an order upon the town, made by a competent tribunal, to wit, the road commissioners, valid and subsisting, to comply with which, they were under a legal obligation ; but the remedy provided by the statute, and the power of the commissioners in relation thereto, were abolished and taken away by the repealing act. By force of the same statute, their exemption from an indictment, was also abolished and taken away. They were then liable to any proceedings at common law or by statute, to enforce a compliance with the order, or punish their neglect, if they disobeyed the same. But inasmuch as no remedy was provided by the statute, and as a duty was imposed upon the town by an order from a known and competent tribunal, which they were under obligation to perform, a duty of a public nature, for the benefit of the public, a neglect to comply with which was necessarily highly injurious to the public, they are clearly liable to be indicted at common law, if they neglect their duty in this particular by disobeying the order. This was intimated in the case of *Royalton vs. Farr*, 5 Vt. Rep. 458, though not decided, as it was not a point directly before the court, in that case.

The statute of 1833 makes no provision for cases similar to this, and the statute of 1834, though it makes ample provision for future cases, yet can have no effect on this indictment, which was then pending ; and further, it may be questioned whether the common law remedy is in any way affected by that statute, which only provides another remedy.

The opinion of the court is, that the indictment is sufficient, and judgment must be rendered thereon.

ORANGE COUNTY.

MARCH-TERM, 1835.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice*.

| | | | |
|---|---|-----------------|------------------------------|
| " | " | STEPHEN ROYCE, | } <i>Assistant Justices.</i> |
| " | " | JACOB COLLAMER, | |
| " | " | JOHN MATTOCKS, | |

ERASTUS ALLEN vs. CHARLES CARPENTER.

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Where the debtor in execution has been committed to jail, and released on taking the poor man's oath, an alias execution against the goods of said debtor cannot issue on the same judgment, without *scire facias*, after more than eight years after said release.

This was an application to the county court to supersede an execution as improperly and irregularly issued from that court. At December Term, 1824, Carpenter recovered a judgment against Allen, on which execution issued, and Allen was committed to jail, and on the 10th day of March, 1825, was admitted to the poor debtor's oath, and released from confinement. Nothing further was done until the 25th day of August, 1834, when said Carpenter prayed out execution of that date against the goods, chattels and estate of Allen, and levied the same ;—to supersede which, as irregularly issued, this application was made. Carpenter having been duly notified of the application, appeared, and the county court did order said execution superseded. To this decision, Carpenter filed exception, and thereupon the cause passed to this court for revision.

Upham for defendant.—In the court below, the plaintiff, Allen, applied to have an execution set aside upon the ground that it had irregularly issued against him. This application was sustained, and the execution was set aside. The defendant, Carpenter, took his bill of exceptions to the opinion and decision of the court, in setting aside the execution. And two questions are now presented

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for the consideration of the court: 1st, Was the case a proper one for a bill of exceptions? And 2d, Did the execution irregularly issue?

1. We admit that the repeal of the court below, to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to continue a cause, cannot be assigned as a cause of reversal or a writ of error. Indeed, many incidental orders are made in the progress of a cause, before trial, upon which error cannot be assigned. But when a decision is made upon the trial which disposes of the whole case, we insist, a writ of error will lie.

The books say a bill of exceptions ought to be upon some point of law, either in admitting or denying of evidence, or a challenge, or some matter of law arising upon facts not denied, in which either party is overruled by the court.—Bull N. P. 316. 1 Swift's Dig. 771.

In the case at bar, a question of law arose in the county court upon facts not denied by the defendant, and he was overruled, and his execution set aside. Had he not a right then to tender his bill of exceptions, and pass his cause to this court for revision? We think he had.

Again, the act of 1826 declares that all questions of law decided by any county court, and placed upon the record, by the agreement of parties, on the allowance and order of such county court, may pass to the supreme court for their decision, the same as questions of law that arise on jury trials.—Vide Acts of 1826, p. 3.

2. As to the issuing of the execution. We maintain that the execution was regularly issued, and ought not to have been set aside in the court below.

A debtor in jail does not pay his debt by taking what is called the poor debtor's oath, and thereby procuring his discharge from further imprisonment. The 13th section of the act of 1797, relating to jails and jailers, declares that all and every judgment obtained against any such prisoner, (that is, any prisoner who has been discharged on taking the poor debtor's oath,) shall, notwithstanding such discharge, be and remain good and effectual in law, to all intents and purposes, against any estate whatever, which may then, or at any time thereafter, belong to any such prisoner; and a new execution may issue, *at any time*, against the goods, chattels or lands of such prisoner, in the same manner as might have been done, if the prisoner had never been in execution.—Statute, 222.

By the express provisions of this section, Carpenter, the creditor in the execution, had a right, *at any time*, to take an execution against the goods and chattels of Allen, the debtor. If he could take it after a year and a day without *scire facias*, he could take it at any subsequent period of time, when he could find property to satisfy it.

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This section does not require a *scire facias* to enable the creditor to obtain his execution: he may take it *at any time*, by applying to the clerk of the court in the county where the judgment was rendered.

In some instances, the statute directs a *scire facias* in order to obtain an alias execution. Where an execution has been levied on property not belonging to the judgment debtor, a *scire facias* is necessary.—Stat. 213.

By the 5th section of the act of 1823, after a poor debtor has been discharged from jail by the commissioners, the creditor is authorized, *at any time*, to take an alias execution against his goods and chattels, &c.—Stat. 241.

So where a debtor has been committed to jail, and remains there for years, the creditor in the execution may discharge him, and take an alias execution against his goods and chattels, &c.—Stat. 228, sec. 3.

We do not think the court are at liberty to treat the words "*at any time*," introduced into the two sections of the acts to which we have referred, as senseless and unmeaning. We believe the legislature used the words for the express purpose of giving the judgment creditor a right to take an alias execution, without the cost of a *scire facias*, *at any time*, when he could find property to satisfy it.

Peck for plaintiff.—1. This application was addressed to the discretion of the court below, and their decision cannot be received by this court. It is like the application to an inferior court for a new trial, the granting or refusal of which cannot be assigned as error.—6 Cranch, 206.—5 *id.* 11, 187. 4 Wheat. 213.—7 *id.* 248.—9 *id.* 576.—11 *id.* 280. 1 Peters. Rep. 165. 6 East. 333.

2. The execution was properly set aside, it having issued more than a year and a day after judgment.—3 Bl. Com. 421. 2 Wills. 82. Co. Litt. 290. 1 Saund. 6 n. 1. 3 Caen's Rep. 267. 5 John. Rep. 523.—8 *id.* 365.—6 *id.* 106.—13 *id.* 450.—16 *id.* 117. 1 Cowan, 711.—8 *id.* 192. 1 Aik. Rep. 339.

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But the plaintiff insists that his execution is warranted by the act of 1797, sec. 13, (Comp. Stat. p. 222) and that that statute has altered the common law in this particular, inasmuch as it provides that execution may be taken out *at any time*. When the whole section is taken together, it will be found that it does not bear out the plaintiff in his position. The first part of the section provides that the judgment shall be good and effectual against the property of those who may be discharged according to the provisions of the act; and then it provides that "a new execution may issue, at any time, against the goods, chattels, or lands of such prisoner, *in the same way and manner* as might have been done, if the prisoner had never been in execution." How then would the creditor have obtained an alias execution, had the debtor not been arrested? It is most manifest that it would have been legally abated by applying to the clerk of the court rendering the judgment, at any time within a year and a day after the return day of the original execution; but if more than that time had elapsed, he must have revived the judgment by a *scire facias*. The last mode designated is, then, according to the very terms of our statute relating to the discharge of poor debtors, much like the insolvent act of the 12th Geo. III. c. 23, the 34th section of which declares, "that the future effects of insolvents, (except clothes and tools, of the value of £20,) are to be liable as before the act; and that any creditor may *at any time hereafter* sue out execution on any judgment at the time of the act recovered, but not against his person," &c.—But no special execution can be taken out on this section, without first suing out a *scire facias*.—(*Buxton et al. vs. Mardin*, 1 T. R. 80.) Yet the wording of this section furnishes a stronger argument in support of the position taken by the creditor, than that of the 13th sec. of the act of 1797, as it does not point out the *way and manner* in which the special execution shall be obtained.

3. But, at all events, an execution cannot be taken out after the expiration of eight years from the rendition of judgment. By the discharge of the debtor, in the present case, the judgment was not extinguished, but an action of debt or *scire facias* might have been brought upon it, and his property attached.—3 Mass. R. 193. This remedy, however, must have been pursued within eight years after the rendition of the judgment, and at the time the execution was taken out, the remedy, by a suit upon the judgment, was barred by the statute of limitations; and by analogy, the right to an execution was barred.

The remedy upon the judgment being gone, the right to execution would seem to fall with it. Thus by a release of *all debts or duties*, the debtor is discharged of an *execution*, because the debt or duty on which it is founded is discharged.—Co. Lit. 291.

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If an execution, in a case like the one before the court, can be taken out on a judgment of ten years standing, it may on a judgment twenty years old. This certainly is giving a construction to the statute, that was never contemplated by the legislature. By the common law, the discharge of a debtor from imprisonment on execution, would be a discharge of the debt; and to provide against this effect, the 13th section was passed; the legislature intended thereby to give the creditor the same right against the debtor's property to coerce payment of the debt, that would have existed had he not been discharged. The legislature could never have intended to give the creditor any other or greater right.

The opinion of the court was delivered by

COLLAMER, J.—By the statute relating to jails and jailers, and for the relief persons imprisoned therein, provision is made that poor prisoners may take the oath therein prescribed, and thereupon be discharged. In the 13th section, (Stat. p. 222,) it is provided, “That all and every judgment obtained against any such prisoner, shall, notwithstanding such discharge, be and remain good and effectual in law, to all intents and purposes, against any estate whatever, which may then or at any time afterwards belong unto any such prisoner; and a new execution may issue, at any time, against the goods, chattels or lands of such prisoner, in the same way and manner as might have been done, if the prisoner never had been in execution.”

We are now called on to decide that the words “*at any time*” are to be taken by themselves, without limitation or qualification, and enable the creditor not only to take execution after a commitment, but after the year and a day, and even exempts such judgment from the statute of limitations, and by consequence from all presumptions arising from lapse of time. This would give to these words an effect which, even if the sentence contained no qualifying words, the court would be slow to believe was intended by this statute. The object of this expression is, however, quite obvious. It was considered that when a debtor had been in *execution* or imprisoned, it operated a discharge of the judgment. To prevent this effect, in case of the discharge of the body, by the poor debtor's oath, this section was enacted. Hence the concluding

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expression, *as if the prisoner had not been in execution*. It puts the judgment on the same ground as any other *unsatisfied* judgment, except as to process against the body. The statute in words provides that the new execution against the goods, &c. is to issue at any time *in the same way and manner* as might have been done had not the prisoner ever been in execution. Now in what *way and manner* must an alias execution issue? By the common law, if a judgment lay dormant more than a year and a day, it was presumed to be satisfied. If the judgment was for a debt, the action of debt on the judgment was necessary. If the judgment was for *land* where *debt* could not be sustained, a *scire facias* was brought. In both cases the declaration alleged the judgment to be unreversed and unsatisfied, and the defendant must come in and show his accruing defence, if any he has. By statute, (West. 2) *scire facias* was given in personal actions, for conformity. This being a statute not *creating a right*, but merely regulating the *form* of remedy, has been adopted by the usages of our courts. In ordinary cases, after a year and a day, no execution can issue on a dormant judgment, on account of the presumption. While a debtor remains in prison, perhaps no presumption can arise, but he may as well be presumed to have paid the judgment after his release from imprisonment, as any other debtor. There can be no reason why *scire facias* should not be brought to allow him the opportunity to show payment, accord, tender, limitation, or any other accruing defence as much as to any other debtor. Such is the *way and manner* in which alias executions are to issue, when a debtor has not been in execution, and therefore by the express words of this statute such is the *way and manner* in which this should have issued. It therefore irregularly issued, and though issuing from a court of competent jurisdiction, it was not *void*—it was properly superseded by the county court.

Judgment affirmed,

LYMAN FITCH vs. DANA ROGERS.

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Where the plaintiff an officer, with a writ of attachment, went within five or ten rods of a wagon, which the creditor's attorney there turned out on said writ, the said wagon then being in the road, in full view; whereupon the said officer went away to attach other property, and did not go to said wagon, or remove it, or send any one so to do, or to keep control, or give notice to any one, and did not return to the same until an hour or more, and in the mean time the defendant, in good faith, and without notice, had purchased said wagon of the owner, and taken possession thereof, the defendant is entitled to hold the same.

This was an action of trespass for a wagon. Plea—*general issue*. The plaintiff, in support of the issue on his part, proved that he was, in the year 1832, sheriff of Orange county, and that Josiah White was his deputy.

In farther support of said issue, the plaintiff offered in evidence an original writ from the files of the court, and the officer's return thereon. Said writ was in favor of ——— against Joseph Huse, which was objected to by the defendant, and admitted by the court; and defendant excepted.

In farther support of said issue, the plaintiff gave evidence tending to prove, that on the 13th day of July, 1832, Daniel Azro A. Buck Esq. and Josiah White, deputy sheriff, went to West-Fairlee, to attach the property of said Joseph Huse,—that in looking for the said Huse's property, the said Buck and White, when within a distance of from five to ten rods of said wagon, saw it. The hind wheels were near the said Huse's house—the fore wheels near them, and the body lay by the fence.

(At the distance aforesaid, from said wagon, the said Buck, turned the same out to said White, who then had said writ in his possession for service. The said White went, at that time, no nearer said wagon, nor sent any one to secure it for him; but went in pursuit of other property.)—In an hour or so he returned and found the defendant and one Robinson putting the wagon together. The said White then claimed that he had attached said wagon, as the property of said Huse. The said Rogers claimed that he had purchased of said Huse, said wagon; but said White took the wagon, (the said Rogers declaring he would sue him,) and put it into the possession of Mr. Southard, for safe keeping.

Defendant admitted that he took said wagon, standing on the premises of said Southard, as his own property.

The defendant, in support of the issue on his part, adduced evidence tending to prove, that he was a *bona fide* creditor of the said

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Joseph Huse, and that on the forenoon of the 12th July, 1832, he purchased said wagon of the said Huse, in part payment of his debt against him, and that he went with Robinson to put said wagon together, and take it home with him, not knowing that the said White or Buck had seen or attached it ;—that when the said White came up, and claimed that he had previously attached it, the said Rogers stated that he had purchased it, and forbid the said White taking it away ; but he *did* take it.

The counsel for Rogers requested the court to charge the jury, that if the said White and Buck only went within five or ten rods of said wagon, when they made their pretended attachment, and then went away without sending any person to remove said wagon, or take the custody of it ; and Rogers, a *bona fide* creditor of Huse, purchased it in payment of his debt, without any notice that the said White had seen it, or claimed to have attached it—the said Rogers having got possession of said wagon, can hold against the pretended attachment of said White.

That if the wagon was legally attached by the said White, and he left it in possession of the said Huse, and Rogers, after said attachment, and without notice it had been made, purchased said wagon, in payment of his debt against Huse, and got possession of the same, before said White, he can hold it by virtue of his purchase.

Whereupon, the court refused to charge the jury as requested by the counsel for the defendant, and charged as follows, viz :

That if they found that Mr. Buck, the attorney for the plaintiff, in the suit named, went with White, a deputy sheriff, to the residence of Huse, the debtor, for the purpose of attaching property, and finding the wagon in question in the road or field, near said Huse's, in full view of said Buck and White, being within five or ten rods thereof, and attorney directed said officer to attach the wagon, said officer having the writ in his hands, intending to make said attachment, and so then declared or expressed himself, the wagon being within his control, then, while said officer was attaching other property of the same defendant on the same writ near by, if the defendant, within an hour, bought said wagon of Huse, on a *bona fide* debt, yet the attachment was valid in law, and would take priority of the purchase.

To this charge, the counsel for the defendant excepted ; and also to the refusal of the court to charge as requested. Said exceptions were allowed, and after verdict and judgment for the plaintiff, the cause passed to the supreme court for revision.

Upham for defendant.—The question in this case arises upon exceptions taken to the charge of the judge in the court below.

It is insisted by the defendant, 1, That White, the deputy sheriff, made no valid attachment of the wagon in question, before the defendant purchased it, and took it into his possession.

To constitute an attachment of goods, the officer must have the *actual custody* of them: it is not sufficient that he has a *view* of them at the distance of *ten rods*.—*Lane et al. vs. Jackson*, 5 Mass. Rep. 157. *Train vs. Wellington*, 12 Mass. Rep. 495. *Phillips et al. vs. Bridge*, 11 Mass. Rep. 242. *Lyman vs. Lyman et al.* 11 Mass. Rep. 317. *Knapp vs. Sprague*, 9 Mass. Rep. 258. *Vinton vs. Bradford*, 13 Mass. Rep. 114.

2. If the officer, White, made a legal attachment of the wagon at the distance of ten rods, and went away in search of other property, without removing it, or sending any one to take charge of it, and the defendant without any knowledge that it had been so attached, or seen by White, the officer, purchased it in good faith, in payment of a *bona fide* debt against him, and took immediate possession of it, he can hold it against the claim of White, the officer, founded upon his pretended attachment. And the jury should have been so instructed.—Vide *Denny vs. Warren*. 16 Mass. Rep. 420. *Gordon vs. Tenney*, 16 Mass. Rep. 463. *Bagley vs. White*, 4 Pick. Rep. 395. *Gale vs. Ward*, 14 Mass. R. 352.

Buck for plaintiff.—The first question presented in this case is, as to the title of the plaintiff to the property mentioned in the declaration. The right of the plaintiff depends upon the attachment, as related in the bill of exceptions; and the jury, by their verdict, find, that the plaintiff had a writ of attachment against Huse, was shown the property in question, and directed to attach it on the writ—was within from seven to ten rods of the wagon, then standing in the highway, and that the plaintiff might have taken actual possession and moved it off. This constitutes a valid attachment, and the plaintiff thereby acquired possession of the goods.—12 Mass. Rep. 485, *Train vs. Wellington*.

A second question in this case is, has the plaintiff lost his right of possession to the goods attached? On this point, the charge of the court was correct. The lapse of time before the sheriff removed the goods, is no evidence of abandonment; they were not left in possession of the debtor, and were removed within one hour from the attachment; and they find that the pretended purchase of the defendant was made after the attachment.

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Rogers.

The opinion of the court was delivered by

COLLAMER, J.—There is in this case testimony tending to show the turning out of this wagon to the officer, but there is none tending to show he had taken or manifested any intention to take it, until after the defendant had taken it. It was improper for the court to leave to the jury a point on which there was no testimony. It is unnecessary here to decide precisely what possession must be taken to constitute *an attachment*, in the abstract. Perhaps less would be required as against the owner or a wrong-doer than against a *bona fide* purchaser or creditor. It has been fully and repeatedly decided, in this state, that to constitute a sale as against subsequent purchasers or attaching creditors, possession must accompany and follow the sale; which possession must be visible, continued and exclusive. In strict analogy with this, and for the same reason, an attachment must have the same character. Such we consider the weight of authority. In the case *Newton vs. Adams et al.* (4 Vt. Rep. 437,) the court say, “Such possession shall be taken as will give sufficient notoriety to the attachment;” and in that case, stress was laid on the officer having *exclusive* possession of, and fastening up the building. Even in the case of *Train vs. Wellington*, (12 Mass. R. 495,) relied on by the plaintiff here, the court lay stress on the fact that the officer continued in possession by his servant, who gave notice to the defendant before he took the goods. We have failed to find any adjudged case which sustains this plaintiff. In all cases where the attachment has been holden good as against third persons, acting in good faith, the officer has been in actual, visible possession by himself or servant, or has secured the place of deposit, or there has been actual notice. In this case the officer took no actual, visible possession, nor did he leave any keeper, or lock up the place of deposit, or remove the property, or give any notice either to the owner or any other person that he had taken or even intended to take the wagon, until after the defendant had purchased and taken it. The attaching officer and purchasing creditor being in equal right, the first actual possessor must hold.

Judgment reversed.

TOWN OF NEWBURY vs. TOWN OF TOPSHAM.

ORANGE,
March,
1835.

Where a single woman, in the year 1812, went to her brother's in T., carried her beds, chests, &c. which were kept there for a number of years, without being warned out, and to which place she usually returned after occasional absences, *Held*, That she thereby gained a settlement in T.

This was an order of removal of Sarah Cunningham, a pauper, from the town of Newbury to the town of Topsham in said county, made by two justices of the peace. The appellants appealed from said order of removal, and duly entered their appeal in the county court, where an issue was joined to the country on the plea of unduly removed. A verdict was taken for the appellees, subject to the opinion of the supreme court, on the following case :

Sarah Cunningham, single woman, and the pauper, now aged about eighty years, about the year 1789, went to live with her brother, James Cunningham, in Topsham, and kept house for him till 1792, when she left her brother's and went to live with one Wallace, in said Newbury, with whom she resided until about the year 1804, when she left said Wallace's, and lived with one Ford in said Newbury, a few months, and then removed to one Bayley's in Newbury, and resided with him several years, and until about the year 1812. When the pauper first lived with her brother, in Topsham, she owned a bed, and one or two chests, in which she kept clothing, and which she caused to be removed to said Ford's, after she had lived in Newbury several years.

In 1812, she again removed said bed and chests to her brother's in Topsham, and staid there herself a few weeks, and then went off to Newbury. From that time up to the winter of 1829, her bed, &c. were kept at her brother's, to whose house she went in the winter, and would generally stay with him from one to three months, when she would again leave and be absent in Newbury and the adjoining towns till the succeeding winter—generally, however, in the course of the summer, going to her brother's once or twice, staying but a few days.

In the winter of 1829, her brother removed from Topsham, where she conveyed her things to be carried to one Sanborn's, in Topsham, and from thence to her nephew's in the same town, where they were kept until the winter of 1832, when they were removed to Newbury. Since her brother left Topsham, she has continued to be at her friends' in Topsham occasionally, having several nephews residing there, from 30 to 40 years of age, but tarrying a shorter time than when her brother lived there.

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While her things were at her brother's, she would at times call Newbury her place of residence, "her home," as was the expression; and at other times, she would designate Topsham as "her home." While she resided at Wallace's and Bayley's in Newbury as aforesaid, she generally went to her brother's in Topsham once or twice each year, sometimes staying but a few days, at others, some weeks. Subsequent to the year 1812, she had at her brother's in Topsham, two beds, two chests, three or four chairs, and a spinning-wheel.

Now if the supreme court shall be of the opinion, from the foregoing statement of facts, that the last legal settlement of said Sarah Cunningham is in Topsham, judgment is to be entered on the verdict;—otherwise, the verdict is to be set aside, and a new trial granted.

Mr. Burbank, for Newbury, read 4 Mass. Rep. 312—7 do. 5.—2 Vt. Rep. 437—1 do. 385.

Smith and Peck, for defendant.—1. The pauper, by her residence in Newbury from 1792, down to 1812, acquired a settlement there under the act of 1801—she not having been warned out. She had previously, however, gained a settlement in that town by a year's residence, under the act of 1797. This settlement continues, unless she has subsequently gained one in some other place; and the question is, has she, since 1812, acquired a settlement in Topsham? This question depends upon the construction of the act of 1801, applicable to the circumstances of this case. In order to gain a settlement under this act, it was necessary that the pauper should have *resided* one whole year in Topsham, without being warned out. The case shows, that in point of fact, she at no one time resided there a year; but that she made her brother's the place of deposit for such things as she had, visiting and staying with her brother some few weeks each year. This it is insisted, was not such residence within the meaning of the act, as made it necessary for the selectmen to warn her to depart the town. The statute contemplated that the residence or abode of the person to be warned, should be open and notorious, and such as could leave no one in doubt of the intention of the individual to fix his *domicil* in the town. The present case is not one of that character. The selectmen of Topsham would have no reason to suppose, judging from the acts of the pauper, that she intended to take up her residence in that town; and it is evident from her own declarations, that she as much regarded Newbury as her home as she did

Topsham. The principal part of her time was passed in Newbury and the adjacent towns. Indeed, she can hardly be regarded as having any fixed place of abode, but is rather to be considered as a vagrant. Under these circumstances, it could hardly have been considered the duty of Topsham to have warned her out. In *Newbury vs. Harvard*, (6 Pick. 1,) it was held, that when a person went into a town while the Prov. Stat. (12 & 13 Will. 3) was in force, which is much like the act of 1801, and actually resided in such town several years, but secretly, he did not gain a settlement, though he was not warned to leave the town. The court seem to go upon the ground that the residence must be open and public to render a warning necessary. In the case at bar, the residence of the pauper, if it can be termed such, it is true, was not *secret*, but it was continued for such short periods of time, that the probability of such *residence* coming to the knowledge of the inhabitants, was not much greater than if the residence had been designedly secret. Under the English statute of 13 & 14 Geo. II. by which a settlement is gained by a residence of forty days upon a tenement of £10 annual value, the construction has been so strict as to require the personal residence of the party for that time, and it is not sufficient that his wife and family may have resided on the tenement for that length of time, if the pauper was even necessarily absent.—*The King vs. St. George*, 7 Term Rep. 466. *The King vs. St. Mary Lambeth*, 8 Term Rep. 240.

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All laws relating to the settlement of paupers, are to be construed strictly. Such is the rule that has been adopted both in this country and in England; and if this rule is to be applied to the case before us, the wandering of the pauper into Topsham periodically falls far short of the residence contemplated by the act. The case of *Middletown vs. Poultney*, (2 Vt. Rep. 437) virtually disposes of the present question.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—This is a question as to the settlement of a pauper. The evidence should have been submitted to a jury, under a charge of the court, for them to find the fact of the pauper's residence. Sufficient however is stated in the case, as it is presented, to enable this court to make a decision. It is contended, and probably correctly, that the pauper gained a settlement in Newbury, prior to 1812. If so, it was from the fact of her residing there after the year 1801, without being warned out. The statute of 1797 gave a settlement from *residence only* to persons coming and

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residing in this state, in the town where they first resided for one full year. The statute of 1801 gave a settlement to all persons residing one year in any town, without being warned out. This pauper was never warned, either in Newbury or Topsham. As to persons having a family, their residence is usually determined by the place where their family reside, though the head of the family may be absent. The case of *Burlington vs. Calais*, (1 Vt. Rep. 385) was determined upon this ground. The case of *Middletown vs. Poultney*, (2 Vt. Rep. 437) was attempted to be placed upon the same ground by the town of Middletown, but it was distinguished from the cases where this principle was decided, from the fact that the family of the pauper was broken up, and the wife returned to her father's, not in consequence of any arrangement made by the husband. In relation to single persons, and those who go out to work, or reside, from time to time, with their connexions or friends, it is more difficult to ascertain the place of their residence, with a view of fixing their settlement. Questions in relation to the residence of these kind of persons, are frequent in the settlement cases, and they have usually been determined, on ascertaining the place where they have kept their clothes, or what little property they may have possessed, and to which they resort, as their home, when out of employment. Hence the inquiry where they have kept their chest or their furniture, when they have had any, has usually been considered as of importance, (as it is in this case) for the purpose of ascertaining where their home was.

In the case of *Boardman vs. Beckford and his Trustees*, (2 Aik. 345) this fact became of importance for the purpose of ascertaining the residence of Beckford, and whether he had been an inhabitant of this state.—He was sued as an absconding debtor.—This was denied in the plea, and it was held that where a single man, having a usual place of resort as a home in New-Hampshire, came into this state under a contract to teach a school for three months, leaving a chest of clothes there, and going once or twice to exchange them during said term, and then returning at the expiration of three months, he did not thereby become an inhabitant of this state. The case of the *Mariner*, (4 Mass. Rep. 312) was of this description. The residence, wherever it is, must be open, not concealed. As to single persons, whose business or employment calls them away from home a great part of the time, or who are from time to time living with their friends and connexions, it is always attended with more or less difficulty to ascertain the place of their actual residence. It was not so however in the case under

consideration. Upon inquiry, the selectmen of Topsham could easily have ascertained facts sufficient to warrant them in warning this pauper, if they were apprehensive of her becoming chargeable, or did not wish to have her obtain a settlement in Topsham. Her residence was altogether different from the one mentioned in the case of *Newbury vs. Harvard*, (6 Pick. 1,) where the residence was designedly concealed. In this case, if the pauper gained a settlement in Newbury, it was because she carried her bed and two chests to Ford's in Newbury, about the year 1804, and remained there until 1812. After that she carried them back to Topsham, to her brother's, and this was the place to which she usually resorted and returned, until her brother, in 1829, removed from Topsham—after which, she still continued there with her friends, until 1832. The facts found in this case are, that she had at her brother's, in Topsham, her beds, chests, chairs, &c. during the time of her remaining there, which was certainly enough to designate the town of Topsham as her residence or home. From this view of the facts, we come to the conclusion that her residence was in Topsham, and was of that character, as to give her a settlement under the act of 1801, and also under the act of 1817, having resided there more than seven years after the year 1823, without being chargeable to the town.

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Judgment of county court is therefore affirmed, and the pauper was duly removed.

SETH RIFORD vs. JOHN MONTGOMERY.

ORANGE,
March,
1835.

Where A procured a coat for the use of B, who had permission to wear it, and who sold it to C, and C used it as his own, claiming to be the owner of it, *Held*, That A might maintain trover against C.

That the court were under no obligation to instruct the jury that they might infer a gift of the coat from A to B.

This was an action of trover for a coat, commenced before a justice of the peace, appealed by the defendant to the county court, and tried before a jury, June Term, 1834, upon which trial the plaintiff obtained a verdict in his favor. The cause came here upon the following bill of exceptions, filed by the defendant:

“The plaintiff, in support of the issue on his part, introduced evidence tending to prove, that in January, 1834, he purchased a

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piece of fulled cloth of David Partridge ;—that afterwards he gave a Miss Riford two dollars to purchase trimmings for a coat, and directed her to take said cloth, which the plaintiff informed her he had purchased of Partridge, and go with Asa Riford, and purchase the trimmings, and get the coat cut out, and have Asa Riford measured, for the purpose of cutting said coat, which she did, and paid for said trimmings and cutting out of the two dollars, so received of the plaintiff. The coat was made up, and the plaintiff paid for the making ; and after it was made, the plaintiff told Asa to take the coat and wear it till he called for it.

The plaintiff also introduced testimony tending to prove that said Asa was a person of weak intellect, and a poor judge of the value of property ;—that said Asa was a relative of said plaintiff.

In further support of said issue, the plaintiff introduced the following affidavit of Ehud Darling, in which he deposes as follows :

“I am the officer who served the original writ in the suit of Seth Riford, appellee, against John Montgomery, appellant, now pending in this court. Said writ was handed me by the said Riford on the day of the service of the same, and Riford went with me, and before the writ was served by attaching property, Riford told Montgomery, that the coat he had of Asa Riford, was his [Riford's] coat, and that he demanded of Montgomery said coat, as said Seth's property ; and Montgomery said he had it of Asa Riford, and should not give it up, and denied that said Seth had any right to the coat ; and on the same day, Montgomery said in my hearing, that he had on the coat that he had of Asa Riford, when said Seth demanded the coat as above stated.

“I further testify, that when said Seth handed me said writ, he directed me not to take Montgomery's body on the same, but to attach property, and not make service of the writ until said Seth had seen him and demanded the coat. I took the writ and followed Montgomery about four miles, and told him I had a writ for him in favor of Seth Riford, and he must go back. Montgomery went back about half a mile with me, and then demand was made, as above stated, and soon after the demand was made, said Seth directed me to attach his horse, which I did.”

In answer to a question by defendant, deponent said,

“I do not recollect when I overtook Montgomery with the writ that I put my hand upon his shoulder, and said, ‘You are my prisoner, and must go back with me.’”

The defendant, in support of the issue on his part, adduced evidence tending to prove, that the last of February, 1834, he exchanged coats with Asa Riford, and paid him two dollars as the difference between his and the coat of the said Asa.

The plaintiff gave farther evidence tending to prove, that after the said Asa exchanged coats with the defendant, he wore the coat he had of the said Asa, and that after the plaintiff had traded with the defendant, he expressed a wish to rescind his contract; but the defendant refused, and Asa then told him not to carry the coat away.

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1835.
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Montgomery.

No evidence was given to prove a demand of the coat, before action brought, save what is contained in the above affidavit of Ehud Darling.

The counsel for the defendant requested the court to charge the jury,

1st, That if they found that the plaintiff, with his own money, purchased the cloth, of which the coat in question was made—had it cut to fit said Asa—paid for the making, and told said Asa to take it and wear it, they were at liberty to find a gift of the said coat to the said Asa.

2d, That if they found that the coat was cut and made for the said Asa, and he directed to take it and wear it, and that he *did* take it and wear it, and afterwards exchanged it with the defendant for *his* coat, he, the defendant, not knowing that the plaintiff had any claim to it; the plaintiff, although in point of fact he owned the coat, cannot maintain his action for it, without proving that he demanded it of the defendant, before the commencement of said action.

3d, That the fact of the defendant wearing the coat after he had made the exchange with the said Asa, he being ignorant of the plaintiff's claim to the same, was not, in law, a conversion of the coat, sufficient to enable him to maintain this action.

The court refused to charge as requested by the counsel for the defendant; but charged the jury, that if they found that the plaintiff purchased the cloth, paid for the trimmings and making of the coat, and delivered it to Asa Riford to wear it till the plaintiff called for it, and that it was not paid for by the funds of said Asa; and that defendant, although he had made a legal bargain with said Asa for the coat, yet, if Asa revoked the bargain, before he and defendant separated, and defendant wore away the coat, against the will and consent of Asa, and afterwards wore and used the coat, claiming it as his own; then, in point of law, the coat was the property of the plaintiff, and it was a conversion in law by the defendant, and the plaintiff entitled to recover.

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Upham for defendant.—1. The county court should have charged the jury that they were at liberty, if they believed the witnesses, to find a sale or gift of the coat in question, from Seth Riford to Asa Riford.—1 Shep. Touch. 227. 1 Sw. Dig. 273, 766–7. 2 Bl. Com. 440. 2 Kent's Com. 353. *Graudiac vs. Ardere*, 10 John. Rep. 293. *Moon vs. Hawks*, 2 Aiken's Rep. 390.

2. Asa Riford, after having exchanged coats with the defendant, and made a delivery of his and received the defendant's, had no right to revoke the contract. And the jury should have been so instructed in the court below.—2 Bl. Com. 447. 2 Kent's Com. 363.

3. The jury should have been instructed that the facts proved in the case did not amount to a *conversion* of the coat by the defendant, and that the action could not be maintained without having a *demand* of the coat by the plaintiff, before the action was brought, and a *refusal* by the defendant to give it up.

In trover, *conversion* is the gist of the action, and must be clearly proved.—1 Sw. Dig. 536–7. 3 Stark. Ev. 1494–7–9. *Dunnell vs. Mosher*, 8 John. Rep. 445. *Everitt vs. Coffin*, 6 Wendall's Rep. 603. *Nelson vs. Merriam*, 4 Pick. Rep. 249.

In *M'Combie vs. Davis*, (6 East. 538) the court ruled that taking the property of another by assignment from one who had no authority to dispose of it, as taking an assignment of tobacco in the king's ware-house by way of a pledge from a broker who had purchased it there in his own name for *his principal*, and *refusing to deliver it to the principal after notice and demand by him*, was a conversion. Taking the assignment of the tobacco was no conversion. Therefore, a *demand* and *refusal* was necessary in order to enable the plaintiff to recover in the action.

In *Nixon vs. Jenkins*, (2 H. Bl. Rep. 135) Whitesett, a trader, on the eve of bankruptcy, made a collusive sale of his goods to Jenkins. The assignees of Whitesett brought an action of trover against Jenkins to recover the goods, and failed in their action because they could not prove a *demand* for the goods and a *refusal* by the defendant to give them up.

In the case of *Jones vs. Sinclair*, (2 N. H. Rep. 319) the plaintiff had delivered eight saddles to one Hall, a commission merchant, for sale. Hall became insolvent, and the saddles were taken by Sinclair, a deputy sheriff, on writs against Hall, as his property.—Jones brought an action of trover for them, and a demand, before

the action was brought, was deemed necessary to entitle the plaintiff to recover.

4. The demand testified to by Darling, was made after the action was brought, and not available on the trial.

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E. Weston, for plaintiff.—1. Did the county court charge the jury correctly relative to the plaintiff's property in the coat?

We think there is no error in this part of the charge. The jury were directed to find the property of the coat in the plaintiff, if they found the facts that the plaintiff purchased and paid for the materials out of which the coat was made, and also find for the making, and that it was not paid for out of the funds of Asa Riford: And the jury, under the charge, have found the terms on which the coat was delivered to Asa, which terms rebut any presumption of a gift.

2. Do the facts, as found by the jury, under the charge of the court, amount to a *conversion*?

The facts as found by the jury are, that before defendant and Asa separated, Asa revoked the pretended bargain; and that defendant wore away the coat against the will and consent of Asa, and afterwards wore and used the coat, claiming it as his own.

3 Stark. Ev. 1505—"The defendant being ignorant of the pl'ff's interest, sold part and detained part, it was held that he was liable in trover as well for the goods sold as for those which remained in his hands."

4 Com Law Rep. 86, *Featherstonehaugh vs. Johnstone*.

3 Stark. Ev. 1506—"A redelivery of goods is evidence in mitigation of damages, but no bar to the action—as if A take the horse of B, and ride him, and then deliver him to B."

3 Stark. Ev. 1507—"The sheriff is liable in trover for seizing the goods of a bankrupt, although he has levied the money and paid it over before the commission, and although he had no notice of the bankruptcy.

So the wrongful assumption of property, or right of disposing of goods, may be a conversion in itself, and render unnecessary a demand and refusal.—See C. L. Rep. 322, *Somerset vs. Jarvis et al.*—1 Swift Dig. 536, 537.

The plaintiff is entitled to sue in trover and no demand necessary, as Asa had no authority to sell the coat, and the possession of the coat by defendant was wrongful.—13. C L. Rep. 66, *Selleck vs. Smith et al.*—And 7 C. L. Rep. 145, *Barton vs. Williams et al.*

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The opinion of the court was delivered by

WILLIAMS, Ch. J.—It appears by the case that the evidence introduced tended to prove incontestably the property in plaintiff, that the coat was procured for the use of Asa Riford, who had permission to wear it until called for. He had no authority or permission to sell or exchange it. When he did sell he was liable to the plaintiff. Any one to whom he sold would also be liable to the plaintiff if he either used it as his own or refused to deliver it on demand.

The defendant, however, contended that the jury were at liberty to infer a gift to Asa of the coat, and so requested the court to charge the jury. If the jury were at liberty to draw this inference, still it would be no error, because the court refused to tell them so. If the jury, from the evidence, could come to such a conclusion, it was an inference of fact for them to make. Unless, then, the court had told them, they were not at liberty to draw such an inference, when it was a proper subject for their consideration, it would be no error in the court. It is optional with the court whether to charge the jury on the facts in evidence or not. The jury may disbelieve the testimony given; they may draw inferences from the testimony already in. They are usually reminded of their right and powers in this particular by the counsel. But the court are under no obligation to back up the argument of the counsel and instruct the jury that they may reject the testimony, or draw any remote inferences which are urged upon them by counsel. In this case the facts in evidence would not warrant any such inference as is claimed by the defendant. The jury, from the testimony as detailed, could not, with any propriety, have founded a verdict on a supposed gift of the coat. So far from their being required so to presume a gift, it would have been rather the duty of the court to have returned the jury to a second consideration, if they had found any such gift.

In relation to the conversion, the evidence was equally conclusive. The defendant bought the coat of one who had no right to sell,—used it as his own,—wore it, and claimed to be the owner of it. This was a conversion according to all the authorities, however innocently he may have purchased it, or however much reason he may have had to suppose it to be his. In most cases of conversion the defendant claims a right, or supposes he has a right; and it is never made to depend on the fairness of his intentions, or what he may suppose as to his right. As here was an actual conversion, no demand was necessary to enable the plaintiff to main-

tain this action. The question which has been raised in relation to the demand it is unnecessary to consider, as none was necessary.

We are all of opinion that the defendant was not entitled to the charge requested, and the judgment of the county court must be affirmed. //

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SARAH ROBIE vs. HUGH McNIECE.

ORANGE,
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A complaint for bastardy is a civil suit and may be amended.

On a complaint for bastardy, all that is required is, that the mother swear as to the begetting the child, and as to the father. It is not indispensable, that she swear, that she is a single woman.

After a verdict, it cannot be objected to such complaint, on a motion in arrest, that it is not stated, that the mother is with child, or had been delivered.

This was a complaint for bastardy, and read as follows, except the words in italics, which were inserted on permission to amend:

“To William Spencer, one of the justices of the peace within and for the county of Orange, comes Sarah Robie of Corinth, in said Orange county, single woman, in her proper person, and on oath complaint makes, that on or about the first day of November, A. D. 1833, at said Corinth, in said county of Orange, one Hugh McNiece of Corinth aforesaid did beget a child upon the body of her the said Sarah Robie—that she is now pregnant with a child of her body, begotten by the said McNiece as aforesaid, and that at the time said child was begotten she was and still is a single woman and never married, and said Mc Niece is the father of said child, which said child when born will, unless prevented by a prior marriage, be a bastard.

Wherefore the said Sarah Robie prays that a warrant may go forth to apprehend the body of the said Hugh McNiece, and that he may be brought before your worship and be made to answer the above complaint, and be further dealt with as to law and justice appertains, agreeably to a certain statute law of this state, passed Nov. 9, 1822, entitled, ‘an act relating to bastards and bastardy.’

Sworn to, &c.

SARAH ROBIE.”

After verdict and before judgment thereon, the defendant moved to quash the complaint, and that no further proceedings be had thereon, for the following reasons:

1. It does not appear by said complaint, that the complainant is a single woman, and such allegation is not sworn to by the complainant.

2. It is not alleged by said complaint that said complainant was with child at the time of making said complaint.

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3. Because said complaint is otherwise informal, defective and insufficient.

The court having overruled the above motion and rendered judgment for the plaintiff, the defendant excepted. Exception allowed and certified.

Before trial the complainant moved for leave to amend the complaint, to which the defendant objected. The court decided that it might be done with the approbation of the justice of the peace to whom the complaint was made, and so far as the facts sworn to by the complainant before said justice would warrant. And with the consent of said justice, who was present in court, the following words were added after the word Sarah, to wit—"Robie that she is now pregnant with a child of her body, begotten by the said McNeice as aforesaid, and that at the time said child was begotten, she was and still is a single woman and never married, and the said McNeice"—and the copy of said complaint in court was amended accordingly ; after which the defendant objected to going to trial on the same as so amended, which was overruled by the court and the defendant put to trial. To all which the defendant excepted. Upon these exceptions the cause comes here for revision.

Buck for defendant.—I. The proceedings in prosecution for bastardy are strictly criminal and are adapted to the provisions of the statutes under which they originated, viz. 18 Elizabeth, c. 3, and 6 Geo. II. c. 31. The first of these statutes expressly provides for the punishment both of the father and mother as offenders against good morals.—1 Bac. Ab. 318. 1 Burns' Jus. 198, 177. The process, therefore, is subject to the same rules and liable to all objections applicable to other criminal processes.—Reeve's Do. Rel. 278.

It is no avoidance in this case of the consequences of the nature of these proceedings to say, that though the process is *criminal*, the object is civil, being the compulsion of the performance of a civil duty. The same may be said of many proceedings strictly criminal in all respects ; for instance, against a town for neglect of roads and bridges.

The complaint in this case, as originally made, is decidedly defective :

1. It does not comport with the statute. The statute, as we construe it, requires that 'l the facts necessary to make out a case for prosecution should be on oath, viz ; that the complainant is a

single woman—is with child—that the defendant begot said child and is the father. None of these can be considered predicates merely, but are essential to give authority for the extraordinary and summary process of a warrant and imprisonment. Our statute is almost a verbatim copy of the 6th Geo. II. c. 31, and also corresponds with the statute of Connecticut, cited 1 Swift's Digest, 43. For form under each, see 1 Burns' Jus. 202–3, and 2 Swift's Digest, 784.

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2. The complaint is not even sufficient to sustain an action at law, and a declaration thus defective would be adjudged bad. The complainant says, that the defendant begat a child upon her at a certain time, and if it ever shall be born, will be a bastard. Surely, upon so loose a declaration as this even a civil right could not be enforced at common law.

3. These defects in the complaint are not cured by verdict for reason that defective processes in criminal proceedings, or in form criminal, cannot be cured by verdict.

II. Under the first section we have considered the case under the motion to arrest. There is another question under exceptions.

We do not mean to say that the complaint cannot be amended. A grand jury may in court amend their indictment—an informer his information. The amendments in this case were not made by the complainant. She never swore to the facts contained in the amended complaint, and cannot be held to answer for perjury if the assertions were ever so false. She never signed the complaint nor made the charges therein contained in writing. This was done by the justice in court, who has no authority or control over the complaint more than any other scrivener would have.

Smith and Peck for plaintiff.—1. The court have not jurisdiction of this case; the decision of the court in allowing the amendment not laying the foundation for a bill of exceptions. The allowance or disallowance of amendments is not matter for which error lies.—*Chirac et al. vs. Reinicker*, 11 Wheat. 280. *Walden vs. Den*—*Den vs. Craig*, 9 Wheat. 576. *Wright et al. vs. The Lessee of Hollingsworth et al.*, 1 Peters Rep. 165. So the arrest of judgment, or the granting or refusing a new trial, or a continuance, cannot be assigned as error.—*Fish vs. Weatherwal*, 2 John. Cas. 215. *Bayard vs. Malcomb*, 2 John. Rep. 101. *Henderson vs. Moore*, 5 Cranch, 11, 187. *The M. J. C. of Alexandria vs. Hodgson*, 6 Cranch, 206.

2. The court had authority to allow the amendment. This

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proceeding is in the nature of a *civil suit*, and has the incidents of such a suit, one of which is, that it is amendable.—1 Swift's Dig. 45. *Herriman vs. Taylor*, 2 Conn. Rep. 357. *Fuller vs. The Town of Hampton*, 5 Conn. Rep. 416. *Hill, administratrix, vs. Wells*, 6 Pick. 104. *Mariner vs. Dyer*, 2 Greenleaf, 165. The application to amend was addressed to the discretion of the court below, and the propriety or impropriety of the amendment cannot be revised by this court.

3. The complaint, as originally drawn, is sufficient and contains all the necessary averments. It is according to the form adopted by Judge Aiken.—Aik. Prac. Forms, No. 227. The only objection taken is, that it is not alleged that the complainant was a single woman at the time the child was begotten. This averment is not required, as a married woman may be the mother of a bastard child, and an order of filiation made for its support. It is averred, that the defendant is the father of the child, and that it will be born a bastard unless prevented by a prior marriage. This is sufficient. But,

4. The defects, if any existed in the complaint, were cured by the verdict. The rule in which all the books agree is this; if the issue joined be such as necessarily to require, on the trial, proof of the facts defectively or imperfectly stated, or omitted, and without which it is not to be presumed, that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission, is cured by the verdict at common law; or, in the phrase often used upon the occasion, such defect is not any *jeofail* after verdict.—1 Chit. Plead. 359. 1 Saun. 226, n. 1. Com. Dig. 578, n. L. 1. The questions submitted to the jury in the present case were two. First, was the complainant's child a bastard? And secondly, was the defendant its father? The issue joined necessarily required proof of these facts, and according to the general rule, the alleged defect is aided by the verdict.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—The trial in the county court was on a complaint for bastardy. Before trial, the complainant moved for and had leave to amend her complaint. There was after verdict a motion in arrest, which was overruled. It is contended on the part of the complainant—

1. That the complaint was sufficient without any amendment.
2. If not, that the defects are cured by verdict.
3. That the county court had authority to amend.

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It is in the first place necessary to determine whether the proceeding to procure an order of filiation on a complaint against the reputed father of a bastard child is a civil or criminal proceeding, as the determination of the other points must in some measure be governed by the views which we take of this. It is true the proceedings assume the form which is used in criminal cases. There is a complaint, oath, warrant, order to apprehend and bring the person charged before the session, or justice of the peace, and abide the order of court. The object, however, is not for punishment. It is to ascertain the father and compel him to contribute to the support of the child, if he is adjudged to be the father. The whole proceedings cease, if the woman dies or is married before the child is born, or shall miscarry. All this shows that punishment is not the object of the prosecution. The proceedings probably assumed the criminal form from the statute of Elizabeth, where bastardy was treated as an offence, and the object of the proceeding was two-fold, viz. for support of the child, and for punishment of the father. Furthermore, it is considered as a civil suit in all the neighboring states. Judge Reeve so considers it. Chief Justice Swift says so expressly. Depositions are admitted, bonds are given, plaintiff or complainant can withdraw or release prosecution, unless the overseers control, and even in that case, she can release, if she gives security to indemnify the town. It being considered as a civil proceeding, it has been held that the complaint may be amended.

Considering it as a civil suit, and subject to all the proceedings which are had in civil suits, we must treat the proceedings which have been had in this case in that light, in examining the questions which have been raised.

The complaint was agreeable to a form long known, and is not lightly to be set aside, unless the statute is imperative. All that the statute requires is, that the mother shall charge the person in writing and on oath with having gotten her with child and being the father of the child. It is sufficient that she appear before the justice as a single woman, and in that character make her complaint. The fact that she is a single woman is no part of the complaint, to which she makes oath, and of course it is not necessary that a direct allegation to that effect should be made and sworn to by her. It is more doubtful whether she should not declare herself to be with child, or that she has been delivered of a child, though the statute only requires her to swear, that the person charged has gotten her with child, and is the father of such

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child. The more correct form would undoubtedly be, to insert this allegation directly ; but we are not prepared to say that either of these defects would be fatal to a complaint. The complaint sets forth that the defendant did beget the child, that he is the father, and that the child, when born, will be a bastard, and by inference necessarily charges that she was pregnant at the time of making the charge. But in this case a verdict has been found, which determines that the child was a bastard, and that the defendant was the father. If, then, the facts charged in this complaint were defectively stated, and even if it would not have stood before a special demurrer, yet we consider the verdict has cured any defects, if there were any, in this proceeding, even as the complaint appeared before any amendment was allowed. This renders it unnecessary to consider the question in relation to the amendment. But as this is made a point in the cause, we have also considered this question.

Amendments are usually in the discretion of the court. The exercise of this discretion is not re-examinable by a court of error. If an inferior court permit an amendment in a case where none is allowed by law, the exercise of that power may be a ground of error, when there would be no such ground, if the power was improperly or injudiciously exercised, in a case where there was no question as to the right to exercise it.

Having already considered that a proceeding against the father of a bastard child to obtain an order of filiation and for the support, as a civil suit, it follows that the proceedings were subject to amendment like other civil suits. It has been so considered in Connecticut and in Massachusetts. Hence the county court may, in their discretion, permit amendments under such rules and terms as they shall think are required by the justice and equity of the case. If a new fact is introduced by the amendment, to which it is necessary that a new oath should be taken, the oath should be administered anew. But if the amendment is only for the purpose of the introduction of a fact omitted through accident or carelessness, and to which the oath of the complainant was not necessary, it may be permitted, as in other cases, even on trial. The object of the oath, in the first place, is to obtain a warrant. It is only necessary therefore to swear as to the begetting the child and as to the father. There is no further examination as to other particulars, nor any cross-examination at this time. This is reserved for the trial in the issue to be formed thereafter. Hence when the justice certifies that the complaint is sworn to, it can only mean that it is

sworn to in those particulars. An amendment like the one made in this case is only introducing facts into the complaint, to which it was not necessary that oath should have been made, and was properly permitted. The court observed a good degree of caution, (though I apprehend it was not necessary,) in requiring the approbation of the justice; and it was at least judicious and proper to prevent the complaint from appearing to contain facts sworn to by the mother, if she did not so make oath to them. It may be further remarked, that there is nothing appearing in this case to show that the amendment was not made either by the complainant herself, or at least with her approbation or consent.

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On the whole, we see nothing in this case but that the proceedings of the county court were in every particular according to law, and their judgment must be affirmed.

WASHINGTON COUNTY.

MARCH TERM, 1835.

PRESENT, HON. CHARLES K. WILLIAMS, *Chief Justice.*

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|---|---|-----------------|------------------------------|
| " | " | STEPHEN ROYCE, | } <i>Assistant Justices.</i> |
| " | " | JACOB COLLAMER, | |
| " | " | JOHN MATTOCKS, | |

WASHINGTON,
March,
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IRA DAY vs. REUBEN LAMB.

A judgment is considered as rendered on the last day of the term.

The time of commencement of a suit to avoid the statute of limitations, is the day when the writ issued, but such writ must be served and returned.

The date of the writ is considered *prima facie* evidence of the the day when the same is issued.

This was an action on a judgment rendered by the county court of this county holden on the last Monday of March 1826, for eighty-nine dollars.

Pleas, 1. *Nul tiel* record. 2. Statute of limitations.

The plaintiff in support of the issue on his part, produced his writ dated April 3d, 1834, and served June 30th, 1834.

The defendant in support of the issue on his part, introduced Otis Peck, the officer who served the writ, who testified that the writ was put into his hands for service not over five days before he served it, and that the service was made on the 30th of June, A.D. 1834. The defendant inserted that upon the evidence the plaintiff was not entitled to recover. But the court decided that the plaintiff's demand was not barred by the statute of limitations, and rendered judgment for him to recover his debt and damages. The defendant excepted. This exception was allowed and certified.

Upham for defendant.—1. When did the cause of action in this case accrue? The judgment declared upon was rendered at the March term of the county court in this county in 1826. And

if it is to be considered as having been rendered on the first day of the term the statute had run before the date of the plaintiff's writ.

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By the common law all judgments have relation to, and are considered as having been rendered on, the first day of the term.—*Fann vs. Atkinson*, Willes, 427.—*Lovel vs. Wittshere*, ib. 428, n. Tidd's Practice, 489.

The common law upon this subject has not been altered by our statute, but rather confirmed.—Stat. 93, No. 8.

2. I admit by the common law a suit is commenced when the writ issues. But it is to be understood that the issuing of the writ must be followed up by an immediate delivery of it to the officer for service. If it remains in the office for any considerable time after it is made out, the commencement of the action will be considered on the day the plaintiff took the writ from the office and delivered it to the sheriff for service.—*Bronson vs. Earl*, 17 John. Rep. 63.—*Burdic vs. Green*, 18 John. Rep. 14. *Visher vs. Gansvoort*, 18 John. Rep. 496.—*Ross vs. Luther*, 3 Cowen, 158. *Brown vs. Bobington*, 2 Lord Raym. 883.—*Harris vs. Woolford*, 6 Term. Rep. 617.

In the case at bar the writ was dated April 3d, 1834, and not taken from the office and delivered to an officer for service until the 25th of June following, nearly three months after its date. Now I insist that this suit was not commenced for any purpose whatever, on the 3d of April 1834, but on the day the plaintiff took his writ from the office and delivered it to the sheriff for service. The doctrine of the court in *Allen vs. Mann*, (1. D. Chip. R. 94) does not oppose the position which I have laid down in this case. In that case the writ was made out on the 26th of November 1793 and delivered to the sheriff for service on the 30th of the same month. The issuing of the writ was followed up by an immediate delivery of it to the proper officer for service, and the court were probably correct in ruling that the issuing of the writ was the commencement of the action.—*Rogers vs. Judd*, 5 Vt. Rep.

Smith and Peck for plaintiff.—The only question in this case is, was this action commenced within eight years from the rendition of the judgment.

1. Judgments in this state are considered as rendered on the last day of the term, (*Hoar vs. Commissioners of Jail Delivery*, 2 Vt. Rep. 402,) and the same rule prevails in Massachusetts.—*Herring et al vs. Polly*, 8 Mass. Rep. 113.—*Portland Bank*

WASHINGTON, vs. *Maine Bank*, 11 ib. 204.—*Hildreth vs. Thompson*, 16 ib. 191.

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In England the rule is different. Judgments there are considered as entered on the first day of the term, and for a satisfactory reason. By the common law, all proceedings in a suit at law are stopped by the death of one of the parties. If either of them die before judgment, no judgment can be entered; if after judgment no execution can issue. But to avoid the inconvenience of this principle, the doctrine of relation has been resorted to, and if either party die, the judgment shall be considered as entered the first day of the term, and an execution may issue bearing teste that day, so as to save the fruits of that judgment to the party entitled to it. (16 Mass. 191.) But there is no necessity for the adoption of this rule here, as all executions issued from our courts must bear teste the day after the adjournment of the court, and cannot issue before unless by special order of court.

2. The suing out of a writ is the commencement of a suit so as to save the statutes of limitations, and the date of a writ is *prima facie* the true time when it was issued.—2 John. Rep. 342.—3 Cain's Cas. 133.—5 Cowen, 519.—2 Burr, 950.—17 John. 65.—7 Greenleaf, 370.—8 ib. 447.—5 Wend. 63.

In order to save the statute it is not necessary that the writ should be served before the statute has run; if it is actually sued out in time and served in season for the next court the statute is out of the case.—*Allen vs. Mann*, 1 D. Chip. Rep. 94.

The opinion of the court was delivered by

WILLIAMS, Ch. J.—In this action of debt on judgment to which the statute of limitations is plead, several questions arose on the trial. The first one, to which our attention has been called is, at what time a judgment is considered as rendered, whether on the first or last day of the term; for if this judgment is to be considered as of the first day of the term in which it was rendered, the statute of limitations had run thereon. I am not aware of any established principles of common law applicable to our practice, which determine this question. In England for most purposes a judgment is considered as rendered on the first day of the term. For others it has effect only from the day when signed. Very probable we might adopt the doctrine of relation, where a party died after the commencement of the term and after verdict. It was formerly considered as an unsettled question in this state when a judgment was rendered for any purpose. By some it was considered, as in all cases rendered, as of the first day of the term. Hence, where

the court sat four weeks, as they sometimes did, it left but a short time to charge either bail on mesne process or property attached. By others it was considered as of the last day, and the clerks in some counties were in the habit of making an entry accordingly. This was probable the better opinion. The statute of 1804 put an end to these doubts, so far as respects charging bail or property attached. This statute, however, was rather explanatory, than establishing any new principle. As it respects the statute of limitations, it is highly proper to consider the last day of the term as the time when judgment is entered. Until that time the judgment is not perfect. It is subject to appeal or review, a motion in arrest, or a motion for new trial; and no action of debt or *scire facins* on judgment can be maintained until after the rising of the court. In the case of *Hoar vs. Jail Commissioners*, 2 Vt. Rep. 402, it was stated by the judge who delivered the opinion of the court, that judgments here were considered as entered on the last day of the term, and the cases in Massachusetts are to that effect.

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The next question is, when shall a suit be said to be commenced for the purpose of avoiding the statute of limitation. The words in the statute are, in every case except one, "the action shall be commenced and sued." As to writs of error, the words are, be "commenced and duly served." There is no doubt but that the time when a writ actually issues is to be considered the commencement of the suit. The evidence of the time when the writ issues is usually the date. If a different rule prevails in Connecticut (and we learn that the time of service is there considered as the time to which the computation is made, in view of the operation of the statute of limitation) it probably rises from the phraseology of their statute. In this state the decisions have been that the time of taking out the writ is the commencement of the suit.—*Allen vs. Mann*, 1 D. Chipman, 94. With respect to delivering the writ to an officer for service, all that is necessary is, that it should be delivered in season to be served and returned to the court to which it is made returnable. If the writ is abandoned, or if the writ is not made with an intention to have the same served or be pursued, it is no commencement of a suit. We have no alias or pluries writ in the commencement of a suit in this state; but if a writ is not served no suit is commenced by the issuing of the same. But we consider our statute and the decisions thereon are decisive of the question, that the issuing of the writ when the same is pursued is the commencement of a suit, and is the time to which the computation is to be made to ascertain whether the statute of limitation

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has run on any demand. There is another question is this case on which I have more doubts, and in which I yield to the opinion of my brethren as probably the better opinion. The only evidence put in on the trial to show the commencement of this suit was the writ itself; but no evidence was given to show that it issued when it bore date. When we consider the manner in which our writs are made out,—dated frequently some time before they are signed, and so easily antedated,—I had doubts whether the plaintiff ought not to be required to show, by some other evidence, the time when the writ was actually issued. But from the case of *Johnson vs. Farwell*, 7 Greenleaf, 370, we learn that in Maine the date of the writ is considered as the true time when the action is brought. In the case of *Johnson and Smith*, 2 Burr, 950, the whole of the reasoning of Lord Mansfield is to show that the date is not *conclusive*, implying that it is *prima facie*. And in relation to writings, generally the date is considered as *prima facie* evidence that they were executed at the time they purport to bear date. From these considerations, I the more readily yield to the opinion of my brethren; and concur with them in deciding that the date of a writ must be considered *prima facie*, as the time when the writ issued, or at least, as some evidence of that fact. A defendant, however, must have every advantage of rebutting this presumption or this evidence by examining any witnesses in relation to the time, and by rendering it doubtful whether the writ was antedated or not, throw the burden of proof on the plaintiff, to show the true time when the writ actually issued. The result is, that the judgment of the county court is affirmed.

CHASE and BILL vs. ASA BOWEN.

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March,
1835.

A return of a levy on an execution on land, according to the form given in Chipman's Reports, held valid to pass the land from the debtor to the creditor.

This was an action of debt on judgment, to which, among other things, the defendant pleaded in bar two pleas; that the plaintiffs had caused the defendant's real estate to be set off in full discharge of said execution, and in one of which pleas said return is set out, and in the other, the plaintiff prayed *oyer* of the officer's return on the execution and set out the same, and then demurred to both pleas. The defendant joined in demurrer. The court overruled the demurrer and decided both pleas sufficient, and rendered judgment for the defendant; to which decision the plaintiff excepted.

The return of the officer was as follows:

*"At Orange, April 6, 1830.—*Know all men by these presents, that I, Nathan Foster, constable of Orange, by virtue of the within writ of execution to me directed, having first made demand of goods or chattels to satisfy the same with my fees, and none being shown unto me or found within my precinct, by direction of L. H. Chase, agent for the plaintiffs, did at Orange in said county, on the 6th day of April, 1830, levy the same writ of execution on a certain tract or parcel of land, as the property of the within named Asa Bowen, situate, lying and being in said Orange aforesaid, described as follows—it being four-fifths of the 3d division of Asa Babbit—it being the 15th lot and 12th range, to be taken in regular form with the lines of said lot from the east part of said lot, beginning at the north-east corner; thence on the line of said lot to the south-east corner; thence on the south line of said lot 12½ rods; thence north, parallel with the east line, to the north line of said lot; and on the same day and year last aforesaid, caused the same land to be appraised by Reuben White, Moses Sargent, and Asa Dunbar, *good and lawful* freeholders of the vicinity, chosen, appointed and sworn as the law directs, that is to say, Chase, Bill and Co. the plaintiffs, and Asa Bowen the defendant, both neglecting to agree upon the appraisers, I applied to Thaddeus Clapp, Esq. justice of the peace within and for the county of Orange, who by law may judge between the parties, who appointed *Reuben White, Moses Sargent, and Asa Dunbar, good and lawful* freeholders of this vicinity, who after being sworn by me as the law directs, appraised the above described land at the sum of \$81, 13, in full satisfaction of the within execution and the legal cost thereon arising, as stated in the bill hereunto annexed, and on the 24th day of April I caused the within execution, with my return hereon, to be recorded in the town clerk's office of the town of Orange aforesaid, and also on the same day last aforesaid I return-

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ed this execution to the office of the justice from which it issued, and caused the same to be there recorded.

In witness whereof I have hereunto subscribed my hand and seal this 24th day of April, 1830.

NATHAN FOSTER, Constable."

Smith and Peck for plaintiffs.—1. The levy in this case is void, it not appearing from the officer's return that the appraisers were *disinterested*, or that they resided in the Gore where the land is located.—*White vs. Burnham et al.* decided in Orange county, March term, 1833. The officer having undertaken to designate the manner in which the appraisers were appointed, was bound to show that all the requisitions of the statute were complied with in their selection.

2. The officer does not state in his return that he set off the land in discharge of the execution. For this reason the levy is defective.

3. If the levy is *void*, this action is well brought.

Upham for defendant.—The only question in this case arises upon the validity of the levy pleaded in bar to the plaintiff's action.

If there be an inherent defect in this levy, so that no title to the lands levied upon has passed to the judgment creditors, this action we suppose, according to the doctrine of this court in *White vs. Fox et al.* decided in Orange county in 1834, can be maintained.

But we insist that there is no defect in this levy, and that the title to the land therein described passed to the judgment creditors by virtue of the levy.—Stat. 310, sec. 3 and 4. N. Chipman's Reports, 264. *Dodge, administrator, vs. Pierce et al.* 4 Vt. Rep. 191.

The objection urged against the validity of the levy is, that the officer has not said in his return, in the words of the statute, that the appraisers were "judicious and disinterested freeholders." It is true, the words of the statute are not introduced into the return; but the officer adopted a generality of expression which necessarily included all the requisites of the statute. The return says the appraisers were chosen, appointed and sworn as the law directs. This is the form of expression adopted by Mr. Chipman, and the case of *Dodge vs. Prince*, 4 Vt. Rep. 191, shows such a return to be good and sufficient to pass the title of the lands levied upon to the judgment creditor.

The opinion of the court was delivered by

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WILLIAMS, Ch. J.—The question involved in this case is, as to the legality of the levy of an execution. The levy is an apparent satisfaction, and in order to maintain this action, it must be shown that it was wholly void. In the case of *White vs. Fox* in Orange county, the plaintiff had been evicted and the levy adjudged void. It is to be regretted that it was ever permitted to question these levies collaterally, and I have had occasion heretofore to remark, that the strictness which has been required in them, and the manner in which they have been criticised is a departure from principles adopted in similar cases. Returns on executions, according to the English practice, are made in very general words, and all that is required by our statute is, that the execution and return should be recorded. I do not see why a return in a very general form should not have been adjudged valid to pass the land, until the return was set aside by the court to whom it is to be made. A different rule, however, has prevailed on this subject. The form which was early made, and is to be found in Judge Chipman's reports, has been adjudged to be good. The officer in the case under consideration evidently had reference to that form and has followed it. In some instances he has stated his doings particularly, where the same thing is expressed more generally in that form. The qualification and character of the appraisers, as well as the manner of their being appointed, are stated in the form mentioned by the words, "good and lawful freeholders, chosen, appointed and sworn, as the law directs." The statute (and a similar statute was in force when that form was adopted) requires that the appraisers should be judicious and disinterested freeholders of the vicinity, in the town, &c. This is not stated in this return, unless it is implied in the terms *good and lawful*. It was undoubtedly considered by the one who made the form, that it was so implied. As this levy is in that form, and where the officer attempts to state his proceedings more particularly, it does not appear that the statute has been departed from, as that form has been sanctioned by repeated judicial decisions, we are disposed again to decide that the return was good and effectual to pass the land from the debtor to the creditor, and was a satisfaction of the execution and judgment of the plaintiff.

The judgment of the county court is therefore affirmed.

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LORIN P. WALDO *vs.* OTIS PECK.

Where an agent authorized to sell lands and receive payment therefor according to his discretion, upon a sale thereof takes a note and mortgage in his own name, upon which he receives a horse in payment, the horse immediately becomes the property of the principal.

In such case in an action of trover by the principal for the horse taken by an officer as the property of the agent, he is a competent witness for the principal.

This was an action of a trover for a horse. Plea, not guilty; which issue by agreement of parties, was joined to the court. On the trial of this cause, the plaintiff, in order to support the issue on his part, proved that long previous to the conversion of the horse, claimed he owned lands in Fayston in the county of Washington, and that one Charles Robinson, Esq. had a general power of attorney from him, to bargain, sell, and convey said lands and receive payment therefor as plaintiff's agent and attorney, which power of attorney was duly recorded on the town records of said Fayston.

That said Robinson received a mortgage executed to him by one Marquis Carpenter of a lot of land owned by the plaintiff, to secure the payment of the purchase money of the same, which lot had been previously sold and conveyed by said Robinson by virtue of said power of attorney, and in the name of the plaintiff. Said notes were made payable to said Robinson for convenience of payment, as stated by Robinson in his deposition which is made a part of this case, the plaintiff being a native of Connecticut.

All the evidence as to the reason of said notes being made payable to Robinson aforesaid, *consisted* in said Robinson's deposition. That the plaintiff had authorized the said Robinson to sell said lands or a part thereof, for a horse or horses, or receive a horse or horses on debts then due, and that said Robinson received the horse in question on one of the notes executed to him by said Marquis Carpenter as above stated.

The defendant in support of the issue on his part, gave evidence tending to show that he being constable of the town of Barre, by virtue of a writ of attachment in favor of Alvan Carter, Esq. against said Robinson, he attached said horse as Robinson's property, and sold him on the execution previous to the commencement of this suit; which writ of attachment was issued on a note given by Robinson to Carter. That said Robinson called said horse his property, and offered to sell it; but no evidence was given tending to show that the plaintiff had any notice of the sayings and offers of sale made by Robinson. The defendant also offered evidence

tending to show that at the time said Robinson received said horse on said note as aforesaid, he observed that if the horse suited him he should keep him for his own use, and of this also it was not shown that the plaintiff had any knowledge.

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The defendant then contended that the law arising upon the aforesaid facts, would not authorize a recovery for the plaintiff in this suit; and the court decided that the law arising on the aforesaid facts was against the plaintiff, and that for that reason he could not recover; and judgment was rendered for the defendant. To which decision of the court the plaintiff excepted.

Exceptions allowed, and the cause passed to the supreme court for revision.

The following is the deposition of Robinson :

"I, Charles Robinson depose and say, that for a number of years past I have been the agent and attorney of Loren P. Waldo, Esq. of Tolland, in Tolland county, Connecticut. That I had the agency and care of said Waldo's lands in Fayston, in said Washington county, with orders and directions from said Waldo to sell and dispose of said lands in whole or in part, for such price and such pay as I thought proper. Mr. Waldo had directed if I could, to take a horse or horses in payment for said land, or in payment for debts due for land I had sold. When I sold land for him I generally took the notes in my own name, which I did for the convenience of collection, and when payable in specific property that it might be delivered to my house in Barre. About the middle of February 1832, I received from one McCauly in part payment of land by me sold, and for said Waldo, a certain grey five year old gelding horse. When I purchased said horse it was my intention to have recruited him up and then have sent him to Mr. Waldo, or have turned said horse and accounted with Mr Waldo for the avails of said horse. I never owned said horse or had any interest in him except as above stated, as agent for said Waldo. I may have called said horse mine; I frequently called the land and other property belonging to said Waldo mine, when I had not any interest only as agent. Said horse is the same horse Otis Peck attached in favor of Alvan Carter (vs.) me, and further the deponent saith not.

CHARLES ROBINSON."

Smith and Peck for Plaintiff,—Robinson was the agent of the plaintiff, and received the horse in question in part payment of land owned by him and sold by his agent. In such case the principle is, as established by the whole current of authority, that the owner is entitled to recover whenever he can trace his own property or its proceeds, as distinguished from the factors; and it makes no difference that the note is taken in the agent's name.—*Thompson*

WASHINGTON, vs. *Perkins et al.* 3 Mason, 232.—*Price vs. Ralston*, 2 Dall. 60.
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Scott vs. Surman, Willes Rep. 400.—*George vs. Claggett*, 7 T. R. 359.—*Taylor vs. Plumer*, 3 M. and S. 562.—*Whitcomb vs. Jacob*, 1 Salk, 160, and also note. *Titcomb et al. vs. Seaver & Trustee*, 3 Greenleaf, 542.—*Dension vs. Pickens et al.* 2 Pick. 86.—*Chesterfield, Man. Comp vs. Dihon et al.* 5 Pick. 7.—2 Kent's Com. 486.—Livermore on agency, 267, ch. 7. The defendant can stand in no better situation than his agent, as whose property the horse was taken. *Robinson's* declarations that if the horse suited him he should keep him for his own use, does not difference the case, as the plaintiff had no knowledge of this. When the horse was delivered to Robinson he became the property of the plaintiff, and the defendant having refused to deliver him when demanded, must pay his value.

Mr. Kinsman for defendant.—1. The defendant contends that Charles Robinson's deposition to prove the facts set forth in the bill of exception, was inadmissible.

2. That the note taken payable to Robinson, and the deed taken to secure the payment of said note to Robinson, without any reference to any agency, made him liable to Waldo for the amount. Therefore Robinson was interested in the event of the suit.

If the plaintiff fails to recover in this action, Robinson would be liable over to the plaintiff. The principle of law is, that when the agent acts without disclosing the name of his principal, or where there is no responsible principal, or where the agent transacts the business in his own name, or exceeds his authority, he becomes personally liable. It is therefore believed that the situation of the agent in this case, and the manner in which the business was transacted by him, makes him interested in the event of the suit.

3. The defendant contends that the county court did not err in deciding that from the facts disclosed on trial, the plaintiff could not recover of the defendant, inasmuch as the note on which said horse was received in part payment of the same, was taken and made payable to Robinson, and as was also the deed taken to secure the payment of said note. Robinson held out to the world and treated the property as his own; he therefore became personally liable to pay the plaintiff the value of the horse, and discharged all liability which the debtor was under to the plaintiff. The property of the horse rested in the agent, and was subject to be attached by his creditors. Robinson by using the property in this way was holding out to the world an inducement to give him a credit. Besides

it was kept by Robinson a long time and used as his own. Again, the plaintiff in making Robinson his agent to sell the land, by the nature of that agency, was to look to Robinson personally for the avails.

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The agent, by taking the note payable to himself, vested the property of the note in himself, and placed the note beyond the control of the principal. When the agent transacts the business in his own name, there is no contract existing and no debt created between the principal and buyer.—7 Mass. 319.—3 Mass, 403. If I am right in this position, the title of this horse at the time of the sale from Carpenter to Robinson rested in Robinson and not Waldo.

We contend further if the plaintiff had given notice to Carpenter not to pay the note to Robinson, and Carpenter without any regard to such notice, should pay the note to Robinson, that the plaintiff could have no remedy against Carpenter, and suppose after such notice by plaintiff to Carpenter, Robinson sued Carpenter on the note, could Carpenter settle with any other person and pay said note with safety except to Robinson?

The opinion of the court was delivered by

WILLIAMS, Ch. J.—This was an action of trover for a horse taken by the defendant as the property of Charles Robinson. The question is, whether it was the property of Robinson or plaintiff. Robinson was properly admitted as a witness on the part of the plaintiff. If he had any interest in the suit, it was for the defendant. It appears that the plaintiff, by his agent, sold land and took notes in the name of the agent, for convenience of the debtors in making payment; and probably to enable him, without any special power, to discharge any mortgages taken on the sale. Robinson was only trustee for the plaintiff, and had no interest in the notes. The plaintiff could, at any time, have taken them from him; after which, Carpenter, the debtor, would not have been protected in making payment to him. He could not have availed himself of offsets against Robinson, if he knew that he was only trustee or agent for plaintiff. Where the notes were made payable in specific articles, or where such articles were received in payment of any notes thus taken, the articles received immediately became the property of the principal, and not of the agent. It is of no consequence what were the intentions of the agent as to purchasing the horse. Unless plaintiff assented it could not affect him in any wise, and the plaintiff at any time could have taken the horse from

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Robinson. In short, unless some act was done by the plaintiff, some consent from him, either express or implied, to transfer this horse to Robinson, he could not have been divested of his property therein. He could not be effected by any representations of Robinson, or even by any offers of Robinson to sell unless they were made with his consent, and no such consent is here found. If it was within the limits of Robinson's power or agency, to make sale or exchange of the horse for other property, he might have transferred a good title to any one to whom he might sell, and still would not have been the owner, nor would the horse have been liable to be taken for his debt. The only circumstance from which a jury would have been at liberty to infer any property in Robinson (and this is very slight) would be from the lapse of time after he received it before it was taken, (although the case does not state when it was taken.) But this would be very slight evidence from which a jury could infer that the plaintiff had ever parted with the property which he originally had in the horse, when the same was taken in payment of a debt due to him.

We are satisfied in this case that the property was in the plaintiff, and from the facts which were in evidence the judgment should have been for him.

Judgment of the county court must therefore be reversed, and a new trial granted.

WILLIAM BILLINGS vs. ALGERNON S. WING.

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The following words—"He snaked his mother out of doors by the hair of her head:—it was the day before she died"—are not actionable in themselves.

This was an action of slander. The declaration was in three counts. The first count was on these words: "It is a pity Montpelier should be represented by a man who snaked his mother out of doors by the hair of her head. It is a fact, and was seen by two men."

The second count was on the same words, with this addition: "It was the day before she died." Third count, the same.

General demurrer.

In the county court judgment was rendered that the declaration was insufficient; from which the plaintiff appealed.

Upham for defendant.—This is an action of slander, and comes before this court on general demurrer to the declaration.

The declaration contains three counts, all charging in substance, that the defendant said and published of the plaintiff, that he had committed an assault and battery upon his mother. No special damage is alleged as resulting from the publication of the words. And the question is, are the words charged of themselves actionable?

We take the rule to be, that where the charge, if true, will subject the party charged to an indictment for a crime involving *moral turpitude*, or subject him to an *infamous punishment*, then the words are in themselves actionable.

Ogden vs. Turner, 6 Mod. Cas. 104. S. C. 2 Salk. 696. Starkie on Slander, 16–19. *Onslow vs. Howe*, 3 Wils. 177. *Brooker vs. Coffin*, 5 John. Rep. 188. *Widric vs. Oyer et al.* 13 John. Rep. 227. *Van Ness vs. Hamilton*, 19 John. Rep. 367. *Horcut vs. Harrison*, 1 Hall's N. Y. Rep. 474. *Shaffer vs. Rintzer*, 1 Binney, 542. *Ross vs. McCung*, 5 Binney, 218. *Andrews et ux vs. Koppenheffer*, 3 Serg. and Rawle, 255. *Chapman vs. Gillett*, 2 Conn. Rep. 61, Gould, J. *Eliot vs. Ailsbury*, 2 Bibb's Rep. 473. Hammond's N. P. 298–9–300. 1 Comyn's Dig. 371–2. *Demarest vs. Haring*, 6 Cowen's Rep. 76. *Holt vs. Scholefield*, 6 T. R. 691–4.

In *Ogden vs. Turner*, the court said, "that words to be actionable in themselves must either *endanger the party's life*, or *subject him to an infamous punishment*, and that it is not sufficient that the party may be fined and imprisoned; for that, if any one be

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found guilty of any common trespass, he shall be fined and imprisoned ; and yet, no one will assert, that, to say one has committed a trespass, will bear an action." And in the same case it was held, that where the penalty for an offence by a statute was of a pecuniary nature, an imputation of such an offence would not be actionable, even though in default of payment the statute should direct the offender to be set in the pillory, since the sitting in the pillory was only for the want of money, and not the direct penalty given by the statute.

In *Andrews vs. Koppenheaffer*, (3 Serg. and Rawle, 255,) the supreme court of Pennsylvania recognized the rule as laid down in *Brooker vs. Coffin*, "that the charge, if true, must subject the party to an indictment for a crime involving *moral turpitude*, or that would draw after it an infamous punishment." The judges concurred in opinion, that it must be either a *felony* or misdemeanor affecting *reputation*. And therefore, to charge a man with having committed an *assault and battery*, a *nuisance*, or the offence of *forcible entry and detainer*, though the party would be subject to an indictment and imprisonment, would not be actionable. Indeed, the whole current of authorities, English and American, show that the words charged in this declaration are not of themselves actionable. If they had been published in a newspaper, perhaps they would have been libellous. However, it is not necessary here to decide that question. Actions of this character are entitled to no great favor. Indeed they had no place in the list of civil injuries, until the reign of Edward III., and from that time to the reign of Henry VIII. not one attempt was made to sustain an action of slander.

Merrill and Spalding for plaintiff.—The only question is, whether these charges, or either of them, amount to verbal slander?

The crime charged, considered in technical point of view, is *assault and battery*, but of the highest degree and of the most aggravated nature.

We shall not attempt to refer to the long list of English cases upon slander, for we should meet with contradiction in almost every case.

In 1 Jacob's Law Dictionary, 37, it is justly remarked, that "there is no branch of the law in which decided cases are so contradictory to each other," &c. and that "what words are actionable or not will be more satisfactorily explained by an accurate application of the general principles on which such actions depend

than by a reference to adjudged cases, especially those in old authors."

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In the early cases the criterion seems to have been, whether the words spoken tended to the disgrace or injury of the plaintiff.

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In *Small vs. Hammond*, 1 Bulst. 40, (Starkie, 15) Williams, J. said, "*Where the words spoken tend to the infamy, discredit, or disgrace of the party, there the words shall be actionable.*"

In *Baker vs. Pierce*, 6 Mod. 24, C. J. Holt says, "*whenever any words tended to take away a man's reputation, he would encourage actions for them.*"

In *Button vs. Hayward*, Fortescue, J. observed, "It was the rule of Holt, C. J. to make words actionable, *whenever they sound to the disreputation of the person of whom they were spoken*—and this was also Hale's and Twisden's rule, and I think it a very good rule."

In Finch's Law, 185, it is said, "If a man maliciously utters any *false slander* to the endangering one's law, as to say, 'He hath reported that money is fallen,' for he shall be punished for such report."

In the cases *Onslow vs. Horne*, 3 Wils. 177, and *Holt vs. Sholfield*, 6 T. R. 691, the language is somewhat different, and in the first case it is said, "that the words must contain an express imputation of some capital offence or other infamous crime or misdemeanor."

Starkie on Slander, 40, 41, thinks the words "scandalous" and "infamous" are too vague and loose to form any criterion, and says—"From these authorities, perhaps, it may be inferred generally that to impute any crime or misdemeanor for which corporal punishment may be inflicted, is actionable."

But this definition seems very indefinite—it would extend the action to words charging trespass—for as Lord Holt observes in *Ogden vs. Turner*, Salk. 696, "*a man may be fined and imprisoned in trespass.*"

Comyns considers the test to be whether the crime is indictable. 1 Com. Case for Defamation, D. 9, 377.—"It seems that to charge a brewer with selling unwholesome beer is actionable, since selling such beer is an *indictable offence.*"

In *Mayen vs. Digle*, it is laid down that an action "lies for any words which import the charge of a crime for which a person may be indicted."—Stark. on Sland. 37–8.

We turn with pleasure from the inconsistencies and contradictions of the English authorities to the American cases.

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In 2 Dall. Rep. 60, Shippen, J. says, "Generally speaking, indeed, actions of slander, founded on trifling causes, to gratify a petulant and quarrelsome disposition, will not be encouraged by the court; but when the reputation, trade or profession of a citizen is really affected, for the sake of doing justice to the dearest interests of individuals, as well as for the sake of preserving public order and tranquility, every appeal to the tribunals of our country ought to be encouraged."

"Words which charge, or import the charge of a crime, punishable by law, whatever may be the *nature* or degree of the crime are actionable in themselves."—1 Swift, 461.

Kent, 2 vol. p. 16, says, "The injury consists in falsely and maliciously charging another with the commission of some public offence."

In Connecticut, words imputing to a woman, whether *married or single*, a violation of chastity, are in themselves actionable; the breach of chastity, in every form, from adultery to mere lascivious carriage, being punishable by statute.—*Frisbee vs. Fowler*, 2 Con. Rep. 707.

In New Jersey, to charge a woman with having committed *fornication* is actionable.—*Smith vs. Miner*, 1 Cox Rep. 16.

In South Carolina it has been decided, that to call a man a *mulatto* is actionable, because, if true, the party would be deprived of all civil rights, and would be liable to be tried without the privilege of a trial by jury.—*Eden vs. L'gare*, 1 Bays. Rep. 171.

In *Woodbury vs. Thompson*, 3 N. H. Rep. 194, the case was slander for calling defendant a "*damned whore*"—the punishment by statute for fornication, a fine of *sixty shillings*, &c. The court say, "if the statute embraces women, it does not seem to admit of a doubt that the words laid in this action are of themselves actionable."

Here was punishment by *fine* only, except in case of *inability* to pay, in which case corporal punishment was to be inflicted, which does not bring it within the ~~rule~~ according to Starkie on Slander, 41, and yet the court have no doubt the action would lie.

"In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be, in themselves, actionable."—*Brooker vs. Coffin*, 5 John. Rep. 188.

The principle here laid down was undoubtedly settled by the court after great deliberation.

That very able court, without doubt, saw the impropriety of

making the *punishment solely* a test on the one hand, and on the other seem to have considered that it would be extending the action too far to make it a *sole* criterion whether the crime charged is indictable; they therefore added another ingredient to the definition, which leaves every case, in some degree, to depend on its own circumstances.

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Make the punishment prescribed for the crime charged the test, and the principle in relation to the action of slander would change as often as the punishment should be altered, and yet the moral turpitude remain the same.

In England, perhaps, the rule may answer, for the smallest crimes are punished by corporal infliction. It is not so here:—but the constant tendency with us is to milder punishments.

Suppose this test to be established in this state—what would be the consequence? The charge of two crimes, at least, enumerated in the act in relation to high crimes and misdemeanors would not be actionable, viz. married persons being found in bed together, (see statute 257) and the crime of cohabiting after being divorced, both of which crimes are punishable by *fine only*. While to charge a person with being a *vagrant, idle and disorderly person* would be actionable—as the justice may commit to house of correction for three months.—Stat. 373, sec. 12.

The term *assault and battery* includes every degree of crime coming under the denomination, from a simple unpremeditated assault to an assault by shooting with an intent to *maim merely*, or to the crime charged in the writ.

The statute 270, section 20, declares, “that if any person shall disturb the peace by *assaulting, beating, &c.* he shall be fined at the discretion of the court,” &c. And if such offence be aggravated by any high-handed violence, it shall be the duty of the justice of peace to bind over the offender to the next county court of the same county in which the offence shall be committed.”

Now, admit for the sake of argument, that the lowest degree of assault and battery does not involve *moral turpitude*, yet no one can deny that the higher degrees do.

And this brings the present case within the principle established in the case *Brooker vs. Coffin*, 5 John. Rep. 188, for it cannot be denied that the crime charged in this case is indictable, and it seems as little doubt exists that it involves *moral turpitude*.

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The opinion of the court was delivered by

COLLAMER, J.—The words in this declaration are not attended with any colloquium or innuendo, to give them any criminal character further than the words necessarily imply, and no special damage is alleged.

It is not to be disguised that there is much contradictory decision on the point of what words are in themselves actionable. In many modern cases this circumstance has been much commented upon by the courts. Nor does it appear wholly redeemed from uncertainty by the most recent cases, though courts seem to have labored at certainty in their decisions. The court have examined the authorities as extensively as our time and appliances here would permit, and without taking time now to collate them, the result is as follows.

By the cases in England as collected by Mr. Starkie in his work on slander, and especially by the governing cases of *Onslow vs. Horne*, 3 Wills. 186, and *Holt vs. Scholefield*, 6 T. R. 691, sustaining the case of *Ogden vs. Turner*, 6 Mod., words, to be actionable, must charge a crime which is indictable and which subjects the offender to *infamous punishment*, at least *corporal punishment*. Much is said in the books as to the crime or its punishment being *infamous*, *scandalous*, or involving *moral turpitude*. The latter expression is adopted by Spencer, C. J. in the case *Brooker vs. Coffin*, 5 John. Rep. 188, yet these expressions are undefined and have no certain, technical signification; and although in the case last mentioned the offence subjected to punishment, that is to imprisonment, and imputed female prostitution, yet even that was not considered *moral turpitude*. It is most consistent with certainty, and probably best sustained by authority, to say with Mr. Starkie, “to impute any crime or misdemeanor for which corporal punishment may be inflicted in a temporal court, is actionable.”—Starkie on Slander, 41. Imprisonment is *corporal punishment*, but it must be as a punishment for the offence, and not follow on a default or inability to pay.—6 Mod. 104.

The words in this case charge simply an assault and battery. Its being on a feeble woman, or a mother, gives it no different *legal* character, as it would, had it been charged as committed with intent to kill. By our statute assault and battery simply is punishable only by fine, though by the statute of 1826 the court are empowered to imprison where there is an inability to pay the fine. This, as already shown, leaves the legal character of the offence only matter of fine, and therefore not an offence for which corporal

punishment can be inflicted, and therefore not actionable. To sustain this action we must hold every set of words which charges an assault or breach of the peace actionable, which would be without precedent or authority, and of dangerous tendency ; or we must leave each set of words to be held actionable or not, not by the offence charged, but to depend on the nature and circumstances of aggravation, which is too *uncertain* to be adopted as a rule and is equally unsustained by authority. We consider this declaration as not sustained by any case either in England or this country.

Judgment affirmed.

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CALEDONIA COUNTY.

MARCH TERM, 1835.

PRESENT, HON. STEPHEN ROYCE, }
 " " JACOB COLLAMER, } *Assistant Justices.*
 " " JOHN MATTOCKS, }

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WARNER vs. SWETT and WAY.

An order of a justice of the peace, in pursuance of the 20th section of the act of March 3d, A. D. 1797, relating to legal settlement, and the support of the poor, is not an essential prerequisite to the exercise of the power to bind out poor children as apprentices, which is vested in the overseers of the poor by the 18th section of said statute.

Nor is it required, to authorize such a binding by the overseers, that the child should be permanently chargeable to the town. In A. D. 1826 a widow with her children became chargeable, and were relieved by the town; she went out to service, and her children were placed by the overseers in different families, where they remained till A. D. 1832. One of the children, of tender age, was thus received by the plaintiff, in A. D. 1826, with the assent of the mother, and under a promise of the overseers to bind him to the plaintiff by indentures of apprenticeship. *Held* that the overseers might lawfully execute indentures to the plaintiff in A. D. 1832, although the town had incurred no actual expense in supporting the child since A. D. 1826.

Such children may be bound by the overseers to farmers, as well as to tradesmen and mechanics.

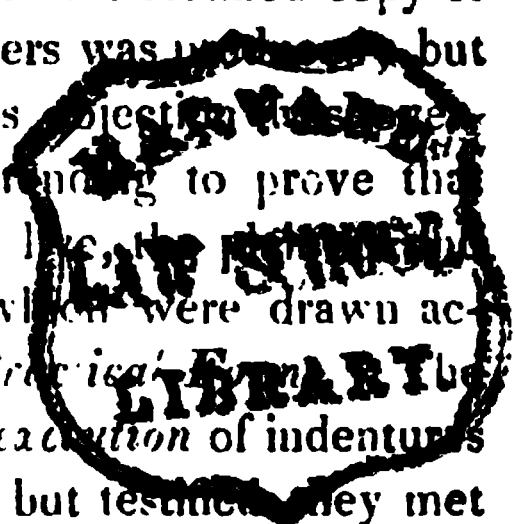
This was an action of trespass on the case, for enticing away from the plaintiff's service one Butler E. Shipman. The declaration contained two counts; the first describing the said Butler E. as the apprentice of the plaintiff, and the second as his servant. A verdict and judgment having passed for the plaintiff in the county court, the cause was brought here on exceptions taken by the defendants. The facts appearing on trial were substantially these:—

The plaintiff gave evidence tending to show that as early as 1825, Butler Shipman, father of the said Butler E. Shipman, had

his residence in Hardwick, and was poor and sick with a consumption and finally died, leaving a widow and several children, and among whom was this Butler E. then about two or three years old. That during the sickness, being in need of relief, he was from time to time furnished by the overseers with provisions, and a cow was hired for his use, and his funeral charges paid. After the death of said Butler, the widow then resided with the children unassisted by the town, except having the use of said cow for the space of a year or more, when the overseers of the poor were informed she was in need of relief, whereupon they proceeded to make inquiry. They found the family in very necessitous circumstances, and in need of relief. It was cold weather, and they made provisions for some wood, &c. The woman found a place for one of the daughters, which the overseers approved. The woman thought she could get on if this boy, Butler E. could be put out; and the overseers then agreed with the plaintiff to take him, if the mother was willing. The plaintiff saw the mother, and she consented. The overseers agreed with the plaintiff to take the boy until 21 years of age, and gave the plaintiff ten dollars, and the boy went there to live, and remained until enticed away by the defendants, as herein after stated. The overseers agreed to bind the boy to the plaintiff. The overseers then found a place for said mother at Mr. Powers', whom they hired to board her, and she went there and remained about nine months, and then went out to service, and has never kept house since.

The plaintiff then offered evidence tending to show the overseers executed indentures of said boy to the plaintiff. The defendants objected to the introduction of such proof unless a certified copy of the record of the appointment of said overseers was produced, but it appearing they were acting overseers, this objection was overruled. The plaintiff introduced evidence tending to prove that soon after said boy went to the plaintiff's to live, the plaintiff and the two overseers met to make indentures, which were drawn according to the form in the book, called *Practical Form*. The witness could not so distinctly recollect the execution of indentures as directly and positively to testify thereto; but testified they met for that purpose, they wrote the indenture, that they recollect nothing interrupting or breaking off the business, and they had ever supposed and believed the indenture was duly executed and left with one of the overseers to lodge with the town clerk, for the benefit of both parties, as was the usage in town; but that recently search had been made with said overseer and in the town clerk's

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office, and said indenture could not be found. The defendant objected that parol proof of the contents of said paper should be admitted to the jury; but the court overruled the objection and admitted the proof. The plaintiff also read in evidence the indenture hereto attached, dated June 25, 1832, which the then overseer executed to the plaintiff on learning the bargain by which said boy was put to him, and being informed that no indenture could be found. The plaintiff gave evidence tending to prove that in July 1832, he had sent the boy on his horse a mile or two from home on business, when he fell in with the defendants, who said that to him which induced him to go away with them to his mother, and he had by her been put to another man and had not returned.

The defendants read in evidence the deposition of Levi Sanborn hereto attached, and also a letter of guardianship to the mother, dated June 26, 1832, hereto annexed, and testimony tending to prove she had called for her boy both on the overseer and the plaintiff.

The defendant requested the court to charge the jury, that there was not sufficient testimony to entitle the plaintiff to recover by virtue of the pretended indenture of 1826. That the relation of overseers and pauper, so as to enable the overseer to bind the children as apprentices, could not be created by occasional acts of charity and relief afforded by the town; but the steps of the statute must be followed, and there must have been the application of the mother, and the assistance afforded must have been of a permanent character, and ordered by a justice of the peace. That if the mother at the time of making the last indenture of the boy was not dependant on the town, receiving aid and assistance as a pauper, but was actually supporting and of ability to support herself and children, said last deed of indenture was void. That the letter of guardianship gave the legal custody of the boy to the mother, and she had a legal right to claim the custody of the child, and if the defendants acted upon her request, the plaintiff was not entitled to recover. That the boy could not be apprenticed to the business of farming, and if such was the indenture of 1826, it was void, and the jury must find the fact proved that the defendant *knew* that Butler E. Shipman was the apprentice of the plaintiff or the plaintiff cannot recover. The court charged the jury they would first inquire whether But' er E. Shipman was enticed away from the plaintiff by the defendants. If this was not proved to find for the defendants, but if it was proved they would next proceed to inquire whether he was bound legally to the plaintiff as an apprentice by

the overseers of the poor. This might be done as well to a farmer as a tradesman. If the jury found the widow was found by the overseers poor and in need of relief, unable to support herself and children, and they proceeded to provide for her and her children, which provision they received, the overseers were authorized to bind out the boy, more especially if so requested by the mother, though there had been no previous formal application of the mother for relief, or no *permanent* provision for support been provided by the town, nor ordered by a justice of the peace. The jury would inquire whether they were convinced from the testimony (if they found the family then chargable) that an indenture of apprenticeship was actually executed, signed, sealed, and delivered by the overseers to the plaintiff, and what were its contents, and if so convinced they would find for the plaintiff. If the jury were not satisfied as to the pretended indenture of 1826, they would next inquire as to the one of 1832. If the child remained where put in 1826 by the overseers, it did authorize the overseer in 1832 to bind out the boy unless the mother was then of sufficient ability to maintain the child. But if the mother was then both able and willing to maintain the child, the overseer was not then authorized to bind him out to the plaintiff, and they would treat that indenture as of no avail. If the boy was not the *apprentice* of the plaintiff by deed of indenture, he was merely his servant, subject to the control of his mother and guardian; and the plaintiff in that case could maintain no action against the defendants for enticing him away, if they acted under her authority or request, otherwise he could. It was not necessary for the plaintiff to prove the defendants *knew* the boy to be his apprentice. If they enticed him away from the plaintiff they did so at their own peril. If the jury found for the plaintiff they would find such damages as to them should seem just, accruing to the plaintiff to the commencement of the action.

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The deposition of Levi Sanburn tended to show,—That Harriet Shipman, the mother of said Butler E., had served in his family at weekly wages for several years next previous to the trial; that she was a healthy, industrious, and economical woman;—that she had a note of thirty-three dollars, which came by way of her husband, and which was collected for her benefit;—that she had been enabled to contribute something towards the clothing of her daughters;—and that when said Butler E. left the plaintiff's service, the witness was indebted to said Harriet for wages about the sum of forty-four dollars.

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Mr. Fletcher for defendants.

Mr. Bell for plaintiff.

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The opinion of the court was delivered by

ROYCE, J.—The questions to be decided in this case arise under the first count in the declaration; since the evidence on trial, and the charge of the judge, would seem to be decisive against the second count, if the first is not supported.

It was decided in *Squire vs. Whipple*, 1 Vt. Rep. 69, that the relation of master and apprentice can be created only by deed, and we are not aware that the authority of that case has been controverted. The plaintiff claimed that this relation had been duly created between himself and the alledged apprentice, Butler E. Shipman, by indentures of apprsnticeship executed by the overseers of the poor for the town of Hardwick, in A. D. 1826, or A. D. 1832. He read in evidence an indenture bearing date June 25th A. D. 1832, and introduced testimony tending to prove, that a similar one was duly executed in 1826, which was lodged in the office of the town clerk for the use of both parties, and had subsequently been lost, or destroyed by accident. The jury were instructed to inquire, whether, at each of the periods aforesaid, the family to which the boy belonged was in such a state of destitution and poverty as would authorise the overseers to act, and whether the alleged indenture of 1826 was in fact executed. In returning a verdict for the plaintiff they have therefore found, that the indenture of A. D. 1826 was executed, and under proper circumstances to give it validity; or that the family were in a condition which justified the binding by indenture as well in A. D. 1832 as in A. D. 1826. In this state of the case, the only subject for consideration is the construction of the statute adopted by the court below.

We think the jury were correctly charged that an order of a justice of the peace, in pursuance of the 20th section of the statute, was not a necessary pre-requisite to a lawful binding by the overseers; and that it was not required that the family should be in a condition of fixed and lasting dependence on the town for support. The 18th section, under which these proceedings were had, confers a discretionary authority upon the overseers of the poor of the several towns, to bind out as apprentices “all such children as are chargeable to such towns, or who do not employ themselves in some lawful business, and whose parents are unable to maintain them, and do not bind them out in good families.” Here are two cases given in which the overseers are empowered to act; and it is only in the first (when the child is actually chargeable,) that the idea of an or-

der under the 20th section would ever be suggested. That provision was intended to protect the towns against indefinite and unreasonable charges for the support of their poor, but has no application to the exercise of the power in question. And besides, the overseers are authorized to charge their towns, to a limited extent, without such order.

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The main object of the 18th section appears to be, to provide for the town a mode of relief from existing burthens, or a means of protection against such as they may reasonably anticipate. It is true, that the probable advantage of the child is also consulted; but as the power vested in the overseers is a power in derogation of parental rights, and may sometimes operate with great severity upon the prospects and fortunes of the child, it should be confined to those cases which come within the evident intention and policy of the statute. There is no reason to doubt that the overseers were authorized to bind out this child in A. D. 1826. He, with his mother and the other children, then needed, and actually received assistance from the town; the family was then separated, because the mother had no means of supporting herself or children; and this boy was received by the plaintiff, under a contract of the overseers to bind him permanently as an apprentice. But as the jury may have thought the execution of the first indenture not sufficiently proved, and may have founded their verdict on the binding in A. D. 1832, it becomes necessary to consider the case with reference to that also. The jury were charged that, as the boy still remained with the plaintiff, where the overseers had placed him in A. D. 1826, the validity of the last indenture would depend on the question, whether his mother was then able and willing to support him. Of her willingness to take him from the plaintiff at that time the case furnishes abundant evidence. We are therefore at liberty to infer, if the jury proceeded upon the last indenture, that they have negatived the latter fact, by finding that she was not of sufficient ability to support him. As the measure of ability here prescribed by the judge was limited to the support of this single child, perhaps a different finding might have been expected. Of this, however, the jury were the proper judges. It was not necessary that the mother or children should then have been actually dependant on the town for relief. The overseers retained their power to act, in virtue of the assistance previously furnished, so long as the mother had not resumed the management of her family, had not bound out her children, and continued unable to support them.

It was further objected to the validity of these indentures that

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the plaintiff was a farmer. The usual definition of apprenticeship at common law is the binding of one to learn a trade. And the business of agriculture alone may not originally have been regarded as a trade for this purpose. No express authority, however, is produced to this effect, and intimations are not wanting to the contrary. 1 Bl. C. 426. But however this may be, there is no ground to doubt the proper construction of our statute. Its object, as already alluded to, is more comprehensive than the mere advancement of professional and mechanic arts. And hence we account for the provision for binding out girls as well as boys, under the designation of apprentices, till their respective ages of eighteen and twenty-one years, the former "to do such work and business as may be suitable to their circumstances and condition." This species of apprenticeship, thus indifferently applied to children of both sexes, derives a peculiar definition and import from the statute. It means to secure to the child *a suitable bringing up*, to some lawful business or employment.

Judgment of the county court affirmed.

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MARY GRAY vs. FULSOME and FELLOWS.

A prosecution for bastardy is in effect but a civil suit, though conducted under some of the forms of a criminal proceeding.

When the defendant in such prosecution is surrendered in court by his bail, the recognizance of the bail is thereby discharged. Such surrender should be pleaded as matter of discharge, and not of performance; but if pleaded by way of performance, and no objection taken by special demurrer, the court will give it its legal effect as a discharge.

A plea in discharge of the cause of action needs only to allege those facts which constitute the discharge.

Debt on recognizance. One Jefferson Leavitt being brought before a justice of the peace, to answer a complaint of the plaintiff for bastardy, these defendants became recognized for his appearance before the county court in that prosecution. The recognizance was conditioned in due form, as directed by statute. Leavitt was ultimately adjudged chargeable, and ordered to pay a certain sum by instalments, with the costs of prosecution.

To the present action the defendants pleaded in bar as follows :

In this cause the defendants come and defend the wrong and injury where, &c., and say the plaintiff ought to be barred from having and maintaining her said action thereof against them, because they say that at the county court began and holden at Danville within and for the county of Caledonia, on the first Tuesday in December 1833, in open court before the judges of said court, and by their leave and permission, and upon the motion of these defendants, they surrendered the body of the said Jefferson Leavitt. And the said court then and there did order and direct that the said Jefferson should be received by the sheriff of said county of Caledonia, and detained in the common jail in Danville aforesaid, until discharged by the course of law. And so the defendants say they have fully kept and performed the conditions of their said recognizance, and this they are ready to verify. Wherefore they pray judgment, and that the plaintiff may be barred as aforesaid, and for costs.

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The plaintiff demurred to the plea, assigning the following special causes of demurrer:—

1. The defendants' say they surrendered the body of said Jefferson, but do not say upon what, or that it was in pursuance of their bond of recognizance, and in performance thereof.

2. The defendants plea is argumentative and uncertain.

3. The defendants do not show how, or in what manner, they performed each and every condition of said bond. Nor do they aver that they performed each and all the conditions of the same. In this, (viz.) they do not aver that the said Jefferson did not only appear before said court, but that he did abide and perform such order or orders as said court made in the premises; nor how and in what manner said Jefferson did abide and perform the same.

4. That said plea is but an answer to a portion of said declaration, neither denying nor admitting that said Jefferson did abide and perform the order or orders said court made in the premises; or that said Jefferson has paid the cost taxed in said suit, or the first instalment fallen due, or that said Jefferson has given recognizance with sureties to the plaintiff, as by said court directed as set forth in plaintiff's declaration.

Fletcher and Swett in support of the demurrer.—1. A plea must be certain to a common intent.—1 Chit. 237, 513.

This plea is uncertain, doubtful, and ambiguous. The defendants say that at the December term of Caledonia county court in 1833, they surrendered the body of Jefferson Leavitt; but do not

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show how they became holden to surrender Leavitt, or that they were in any manner holden, nor in what cause they surrendered him, nor for what reason the court ordered him detained.

2. A plea in bar must confess the facts pleaded to it in avoidance, or it is not a justification.—1 Chit. 511.—2 Salk. 637.

In this plea the defendants confess nothing. It admits no recognizance, nor does it show for what purpose, or in discharge of what duty, or what liability they surrendered Leavitt in court. Had the defendants been bail by endorsing any writ returned to court—had they recognized for his appearance in any felony, he might have been charged with the writ and recognizance would have met this plea as well as the recognizance in this case.

The plea ought to have confessed the allegations in the declaration it intended to meet—shewn before what authority it recognized—what were the conditions of the recognizance—that in pursuance to said conditions they made the motion in court, obtained the order, and they rendered the body of said Leavitt.

The undertaking of the defendants was a matter of record. The plea should have shown the recognizance and the conditions; it should have stated specifically the performance, that the court might have seen if defendants were legally liable, for what they were liable, and if they had discharged their liability according to their undertaking.

3. The plea in bar is argumentative. It alleges that defendants and court did contain things, and then avers, “and so the defendants say that they have kept and performed the conditions of their recognizance.” This is not a direct averment that defendants have kept and performed the conditions of the recognizance. It is not an averment of facts, but of law. Had a traverse been taken upon this averment, it would have been an immaterial issue.

4. If the defendants made application to the court, as by the plea in bar stated, and the court made the order, and they surrendered Leavitt in pursuance of it, and the sheriff took him into custody, it was matter of record, and defendants ought to have plead it and made proffert of the record. This they have not done.

5. The plea undertakes to answer the whole declaration in its commencement, but only answers a portion of it in fact.

There are two branches or conditions of the recognizance set up in the declaration, viz.

1. That the principal personally appear.

2. That he abide and perform the order of court.

The plea only shows that Leavitt appeared at court, but is silent

as to his abiding and performing the orders of court, made in the premises. It then meets but a portion of the declaration.

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6. But the most prominent and most fatal defect in the plea is, that it does not show before what authority the defendants became recognized, that the court might see that there was a legal duty or liability imposed upon them. That it does not show the character or conditions of the recognizance, that the court might have seen the extent of defendants liability. But this plea is so extraordinary vague and loose, the court can give no judgment on it. They cannot tell what recognizance it refers to, nor whether all the conditions of any recognizance have been performed.

Bell and Cushman contra.—1. Defendants contend that by the condition of the recognizance, they are responsible only for the *personal appearance* of Leavitt, and are not holden for the payment of the sums adjudged against him.

They stand as *bail merely*, and if they surrender him up, and he is by the court ordered into the custody of the sheriff, defendants are not liable.

If Leavitt is surrendered, other provision is made by statute to enforce obedience to the order of court.—Stat. p. 367.

As to the first cause of special demurrer defendants say that the plea is an answer to the claims set up in, and refers to, *the declaration*, and shows that Leavitt was surrendered by the defendants in discharge of their said recognizance.

It shows and sets forth the manner and means by which defendants *kept and performed* the condition of said recognizance, *by surrendering up the said Leavitt*.

The third and fourth causes of special demurrer are founded on the position—That although the persons recognized under the 1st section of the act, do surrender up the body of the principal, they are nevertheless further liable that he shall pay the sums adjudged against him.

'This position is untenable.

The opinion of the court was delivered by

ROYCE, J.—This case comes before us on special demurrer to the defendants plea in bar. The declaration is in common form on a recognizance entered into by these defendants, for the appearance of Jefferson Leavitt to answer a prosecution by the plaintiff for bastardy. It gives a history of that prosecution, including the order of filiation, and negates a performance of the condition of the recognizance by Leavitt, as well in reference to that order, as in

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other particulars. The defendants pleaded a surrender of Leavitt in court, pending the prosecution.

A prosecution for bastardy is in effect but a civil suit, though conducted under some of the forms of a criminal proceeding. Its object is wholly pecuniary, and bail for the costs of prosecution is required, as in ordinary suits between individuals. The bail on the part of the defendant may surrender him in court, in discharge of their recognizance; other bail may be substituted; and those who have been thus discharged are rendered competent as witnesses. All this was decided in *Mather vs. Clark*, 2 Aik. 209, and is well settled. That decision has established the analogy between this species of bail and that on mesne process in civil suits, and bail for appearance in criminal cases; the bail having a right in all these cases to surrender their principal into court, in discharge of themselves. It follows that a proper surrender of the principal by his bail has the effect wholly to discharge their recognizance; and hence the position of the plaintiff's counsel, that the recognizance must still remain in force, to insure a compliance with the order of filiation, cannot be supported. The subject matter of the present plea is therefore sufficient, and it only remains to consider the alleged defects in the manner of setting it forth.

It is said the plea does not allege, on what the surrender of Leavett was made, or that the defendants surrendered him in performance of their recognizance. This objection is in part misconceived, since the plea does allege, that by making the surrender the defendants "have fully kept and performed the condition of their recognizance. As the surrender of Leavitt in court was not an act stipulated for in the recognizance, it should have been pleaded as matter of discharge, and not of performance. But as this is a defect of form merely, and not insisted on by the demurrer, we are at liberty to give the facts pleaded their legal operation. In answer to the other ground of this objection, we think it is to be intended that the surrender was made in the suit for bastardy, and consequently that the purpose and effect of the surrender were inferences, sufficiently manifest without any express averment.

It is also said that the plea is argumentative, but we discover no sufficient ground for this objection.

The remaining objections would be well founded, were this a plea of performance, as they appear to suppose. But this is wholly to mistake the character of the plea. Being no other than a plea in discharge of the recognizance, it is properly confined to the allegation of those facts which constitute the discharge.

Judgment of the county court affirmed.

ELIJAH B. WHIPPLE vs. REUBEN POWERS.

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Sheep or cattle let pursuant to the custom or usage of farmers is not usury, though the risk of the life of the animals be, by the contract, on the hirer, if such be the usage.

If money be loaned and by fiction called sheep or cattle, or if there be any color or fiction to bring the loan within the proviso of the statute, it is *usurious*.

The giving up a sheep or cattle contract, without the same being paid, and taking another therefor, fictitiously pretending to let cattle, where none in fact existed, is *usurious*.

This was an action on a note dated 4th November, 1830, executed by the defendant to the plaintiff for forty-one sheep, payable in two years, which came by appeal to the county court and was there submitted to the court on the following statement of facts, agreed to by the parties, to wit:

On the 4th day of November, A. D. 1828, the defendant received of the plaintiff 18 sheep, for which he gave a note of the following tenor, to wit:

"November 4, 1828. Value received, I promise to pay Elijah B. Whipple or order twenty-two dollars and fifty cents in one year with interest, or twenty-seven sheep in two years, to be middling as to size, age and quality—except eight to be lambs—to be delivered at H. Martin's on St. Johnsbury Plain.

REUBEN POWERS."

It is agreed that said defendant did not pay said note, nor any part thereof, but on the 4th of November, 1830, the defendant gave to the plaintiff a note of the following tenor, to wit:

"For value received, I promise to pay Elijah B. Whipple or order forty-one likely' ewe sheep, middling as to age, size and quality, excepting ten which are to be lambs, payable and to be delivered at Hezekiah Martin's on St. Johnsbury Plain, in two years from date.

REUBEN POWERS."

It is agreed that defendant did not pay said note at the time it fell due, nor any part thereof—but on the 4th day of December, 1832, said Powers tendered to Hezekiah Martin the sum of \$28, 50, in full satisfaction of said note last mentioned, said Martin being the person owning said note, which tender was not accepted by said Martin.

It is further agreed that the consideration of the last mentioned note was the giving up of the first note, and whether there was any consideration further for the worth of the half sheep is not known.

It is further agreed, that if the custom of farmers in the letting

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of cattle and sheep and of other property be proper to be received in evidence and considered in the above case, then the fact of the aforesaid custom is referred to the knowledge of the court, and forms part of this case.

It is further agreed, that if the court shall be of opinion, that upon the above statement of facts the plaintiff is entitled to recover upon the last mentioned note, then judgment is to be entered for the plaintiff for the amount of the damage rendered by the justice and the interest and costs.

But if the court be of opinion that the plaintiff is not entitled to recover upon the last mentioned note, and that the tender is a bar, then the court is to render judgment that the defendant recover his costs upon payment of said sum of \$28 50 into court.

The county court made the following entry :

“In this case the court find the fact, that it is and has been customary in this section of the state, among farmers and others, to let cows and sheep to double in four years, and frequently to half double in two years, and where the letter ran the risk of the responsibility of the user, the user ran the risk of the loss of life of said animals. Upon the foregoing statement of facts, and the finding of the court, judgment is rendered for the defendant to recover his costs.”

Whereupon the plaintiff filed his exceptions, and the cause passed to the supreme court.

Paddock for the plaintiff.—The note given on the 4th of November, 1828, was in the alternative to pay \$22 50 in one year with interest, or 27 sheep in two years.

It is a settled principle, that where an obligor hath his election to do one of two things, and does not make such election within the time stipulated, the obligee may afterwards take his election.—

McNitt vs. Clark, 7 John. Rep. 465. Cro. Eliz. 864. Cro. Jac. 594.

The defendant not paying the money at the end of the first year, was bound to pay the sheep or their worth at the end of two years.

Had the defendant paid and the plaintiff received the 27 sheep at the end of the two years, it would not have been usury, for he had it in his power the year before to have paid the \$22 50 in discharge of the demand, and the election to pay the sheep was a voluntary act of his own and not chargeable upon the plaintiff.

The second note was given for, and accepted instead of the 27 sheep. The plaintiff contends that he was justified in taking this

note by the custom of farmers in letting cattle and sheep and grain to double in four years, or half double in two.—Stat. p. 162.

Although a person may embrace more in his note as interest than the law will allow him to recover, it is not usury, if he thought himself legally entitled to it.—1 Vt. Rep. 402, *Bank of B— vs. Durkee*.

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The tender can be no bar to the action, because the \$28 50 is made by adding the interest to the \$22 50, whereas there can be no manner of doubt that the law will give the worth of the 27 sheep at the end of two years, which was \$41 50.

Fletcher for the defendant.—For the purpose of coming to a just and legal decision between the plaintiff and defendant, the case as stated may be considered as a declaration upon the case, predicated upon a series of facts admitted by the parties, as introductory to the plaintiff's right to recover, and the court called upon to fix the damages.

If the rule of damages be the value of forty-one sheep, then the judgment recovered before the justice of peace and the accruing interest are the amount of damages, and the cost of this suit follows.

But if, upon the whole case, the rule of damages be the sum of \$22 50 and the interest from Nov. 4, 1828, the sum agreed upon by the parties and put into the first note, then upon the payment of the sum of \$28 50 into court, being a fraction over the sum of \$22 50 and the interest at the time of the tender made on the 4th day of December, 1832, then judgment is for the defendant to recover his costs.

A legal exposition is to be given to each contract. If the latter contract be void and inoperative on account of usury, or as against the law of the land, or for any other reason, the rights of the parties are flung back upon the first contract, and the tender admits that a recovery might be had upon that. If the last contract be efficient and operative, but uncertain as to the measure of damages, and the consideration of said contract furnish a definite, unerring rule, to wit, the giving up of the first contract, the court will then look into the whole case, the contract of Nov. 4, 1828, of Nov. 4, 1830, and the tender of Dec. 4, 1832.

What then would have been the rule of damages if the action had been predicated upon the contract of Nov. 4, 1828? How were the rights of the parties affected by the contract of Nov. 4, 1830? And is the tender of Dec. 4, 1832, a bar to the right of the plaintiff to recover upon this action?

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A right of action accrued to the plaintiff on the first contract on the 5th of November, 1830. What was then the measure of damages for the breach of that contract? Was it the value of 27 sheep, or \$22 50 and the interest from Nov. 4, 1828?

The case states, that on that day the defendant *received* of the plaintiff 18 sheep. The plaintiff contends, that the contract is to be construed as a letting—the defendant as a purchase of 18 sheep. The term *received* introduced into the case furnishes no rule of construction only as stating the consideration of the contract. For whether it were a letting or a purchase, the sheep would have been received as the consideration of the undertaking—as the *quid pro quo*. We must pursue the contract further for the rule, and inquire for the obligation of the defendant.

He undertakes to pay \$22 50 and interest on the 4th of Nov. 1829, or 27 sheep on the 4th of Nov. 1830. This is not two separate and independent contracts, furnishing two independent rules of damages for the breach thereof, but one perfect and entire contract in the alternative, giving a certain, definite rule of damage, agreed upon by the parties, if not fulfilled.

There was a purchase of the 18 sheep, and not a letting or hiring, as the plaintiff contends. A purchase implies a change of the property purchased and an equivalent to be rendered as a consideration. A letting or hiring, that is, according to *civilious locatio*, implies a thing to be let, a price for the hire, and a contract or obligation to pay for the use of the thing. The price for the use is the essence of the contract.—Story, p. 251, sec. 374. Story's Bailments, p. 250, sec. 372.

The hirer acquires but a special property in the thing hired, to wit, the use, not the general property in the thing itself. If the thing is lost, not by the hirer's fault, he is not answerable.—Story's Bailment, p. 261, sec. 394—p. 265, sec. 399—p. 269, sec. 408.

The thing itself must be restored when the time of hiring is determined.—Story's Bail. p. 273, sec. 414.

These rules settle the character of the contract of Nov. 4, 1828. It was a purchase and not a hiring of the 18 sheep. The right of property by the terms of the contract did not remain with the plaintiff, but passed immediately to the defendant. The defendant was not vested with the special interest, to wit, the use of the sheep, but a general and absolute interest, the right of property. Had they been attached by defendant's creditors, it would have enured to their benefit.

The essence of the contract was not for the hire, but the sheep themselves.

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It was not a return of the property and payment for the use, but an absolute undertaking to pay for the property itself. The risk was cast wholly on defendant, be it what it might. What then would be the rule of damage for the non-fulfilment of the first contract, the \$22 50 and interest, or the value of 27 sheep on the 4th of Nov. 1832?

The contract is an entire contract, though in the alternative, furnishing but one rule of damage for a breach.

The price stipulated by the parties for the 18 sheep is \$22 50. This is the consideration and foundation of the contract. This the plaintiff agrees to receive with the interest and the defendant to pay at the expiration of one year, or 27 sheep at the end of two as an equivalent. The defendant performs neither of the alternatives. The plaintiff is entitled to an action. He must count upon the whole contract. He can no more declare upon the last clause of the contract at the end of two years than upon the first at the end of one. The defendant, to lessen the damage, could not object that the 27 sheep were not of the value of \$22 50 and interest; nor can the plaintiff, to enhance the damage, give evidence that the sheep are of greater value. The case does not admit of special damage. The first clause of the contract rules it. The rights of the parties are mutual and equal. The payment of the 27 sheep is not in the nature of a forfeiture, and if it was, the rule of damages would be the amount of the sum stipulated to be paid.

Were the contract a penal bond with the alternatives annexed by way of condition, the amount of the sum stipulated to be paid, and the interest, would be the rule.

If correct upon this principle, how does the contract of Nov. 4, 1830, for forty-one sheep, affect the rights of the parties?

This contract is void as being unconscionable and usurious, or it is but an extension and continuance of the first contract, and the plaintiff entitled to the same damages he would have been if that had been in force.

If it be unconscionable or usurious, it is void.

It is unconscionable. On the 4th day of Nov. 1830, there was due from the defendant to the plaintiff the sum of \$22 50 and interest two years, and no more, amounting to \$25 20, for the consideration of 18 sheep, purchased two years before.

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If the contract be predicated upon the first contract, to wit, 18 sheep, no man in a christian country could receive, accept, or agree to accept 23 sheep, for forbearance, or giving payment four years for 18 sheep.

If it be predicated upon the sum due at the end of two years for 18 sheep as a consideration, the interest of which is \$2 70, no man who has a conscience could receive for giving further time of payment, the term only of two years, 14 sheep of equal goodness and quality. The analization of the question proves conclusively the fact, that if the value of 41 sheep be the rule of damage, the contract is unconscionable and inoperative.

But if such be the rule, it is usurious, and therefore void. It is either a loan of monies, wares, or some other thing, and if of either, it is more than after the rate of six dollars for the forbearance of one hundred dollars for one year, and so after that rate, and therefore void.—Stat. pp. 162—3.

It is more than after the rate of 25 per cent. as 14 is more than half of 27, and is unknown to any usage or custom of letting practiced among farmers, and therefore not within the proviso of the statute, p. 164.

But this is not a contract predicated upon the letting of 27 sheep, inasmuch as a contract for a specific article (if the first contract was in fact for the delivery of 27 sheep specifically) is not the article itself.

The contract was but a chose in action, and cannot in law be treated *quasi* the property therein specified. It neither falls within the letter or the spirit of the proviso, but within both the letter and spirit of the first section of the statute itself, and absolutely void.

What practice, what usage, among farmers, recognized by law and known to the court, has ever prevailed to treat choses in action as cattle, sheep or grain, and proceed actually to a letting as such, the very essence of which, we have seen, is the use of the thing hired?

In the most favorable view, the second contract is but an extension and continuance of the first contract. The first was predicated upon 18 sheep, the value of which was agreed at \$22 50 and interest.

The second contract had for its consideration the first contract only, nothing added but the extension of the time of payment. For this additional consideration, the law gives six per cent. per annum, and if the parties stipulate for more, and it is concocted

and becomes a part of the contract, the contract is usurious and void.

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If it were at all doubtful what should be the rule of damages, the first contract being the consideration of the second, and no special damage entering into the case, and the rule of damage as to the first being certain and fixed, this ought to govern the case.

If what is just, what is honest, what is equitable, what is right between citizen and citizen, is the rule to be applied in this case, the plaintiff is entitled to the sum of \$22 50 and the interest to Dec. 4, 1832, the time at which the tender was made.

This is what the defendant has offered. He brings this sum into court and is ready to abide by this rule. On the other hand, if the court adopt the doctrine contended for by the counsel of the plaintiff, the poor are at the mercy of the rich, unconscionable bargains may be enforced. It opens a door to oppression—the statute of usury may be avoided, and every shylock in community may cheat and evade the law.

Upon principles of natural justice, the law ought to be so expounded as not to work oppression or give countenance to unjust and unconscionable bargains.

The opinion of the court was delivered by

COLLAMER, J.—As a general rule, the letting of any article to multiply at a greater rate than six per cent. is usurious, and it is difficult to stop and inquire of the fluctuation of price, as that is as likely to rise as to fall. In relation to the letting of cattle, &c, which the proviso of our usury statute permits to be done, agreeable to the usage among farmers, it was decided by this court in the county of Franklin, while Ch. J. Skinner presided, and in a more recent case in the county of Chittenden, that such letting is not usurious, though the risk of the lives of the cattle be on the hirer, and though an unqualified note to deliver a certain number of cattle be taken, if such was the usage. This is not only within the proviso of the statute, but is sustained by the case *Spencer vs. Tilden*, 5 Cowen, 144, where it was decided that *selling cows*, &c. on a contract to return double the number at the end of two years, is not usurious. Also the same point, as to sheep, in *Holmes vs. Wetmore*, 5 Cowen, 144, note.

The first contract had two aspects, and was in the alternative; the defendant having the right to pay \$22 50 and interest in a year, or 27 sheep in two years; and he not having paid the money, the other alternative became absolute, and was good within the proviso

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of our statute, and agreeable to the usage as found by the county court, and therefore not usurious. It must, however, be understood, there must be no *fictions* to bring a loan within this proviso. There must be no loaning *money*, or deferring a *debt*, and calling it cattle or sheep to evade the statute. If there can be no fiction in the first instance, so there must be none in the second or third contract. When the present note was given, the plaintiff let no sheep to the defendant. It is true the defendant owed the plaintiff a previous note, payable in sheep, but it had never been paid and was due for money, was a mere *debt*, and this *debt* was by a fiction called sheep. There were no sheep there, none which plaintiff ever owned. Indeed, as a *letting*, it was a mere ideality, fictitious and colorable, and these pretended sheep had never an identity. It was not a letting of *cattle* or *sheep* within the proviso of the statute, but in the words of the case, "the consideration of the last note was the giving up of the first," not letting sheep. The note now sued is usurious and void, and the plaintiff cannot recover *thereon*.

Judgment affirmed.

ZEBULON DOW vs. DANIEL SMITH.

CALEDONIA,
March,
1835.

For taking property on execution, which is by statute exempt, *trespass* may be sustained.

A two year old heifer forward with calf, when the owner has no other cow, is a cow within the meaning of the statute, and is exempt from execution.

Though the owner of said heifer may have in his possession a cow, which he has sold and cannot retain, though under such circumstances that his creditors might attach her, yet that does not subject the heifer to attachment.

This was an action of trespass for taking and driving away a two year old heifer, and which came by appeal to the county court. Plea, the general issue, with a notice that the same was taken by the defendant as deputy sheriff and sold on an execution against the plaintiff. The plaintiff on the trial, proved the defendant took his two year old heifer, which was forward with calf. The defendant then showed that he, being a deputy sheriff, and having for collection an execution against the plaintiff, took and sold said heifer thereon, as appeared by the return. The plaintiff gave evidence tending to show that he had no other cow except one which he possessed under the following circumstances, to wit: In October 1828 the plaintiff owned a red, lined back cow, and being indebted to Strong & Delano, he procured one Knights to sign with him a note for said debt, and executed to said Knights the following bill of sale of said cow:

“Whereas, Dean Knights has this day signed a note to Strong & Delano for me for twenty-five dollars and seventy cents, I hereby sell, make over, and deliver to said Knights as his property, my cow, three years old, lined back; he to exercise what control over her he pleases.”

That the plaintiff had paid a part of said debt, but it had been sued, and there was still due thereon about thirteen dollars, which Knights had paid since the commencement of this action. Said lined back cow remained in plaintiff's possession until after the commencement of this action.

The defendant requested the court to charge the jury, that the action of *trespass* could not be sustained for taking the plaintiff's last cow in execution. That a two year old heifer, though she be with calf, and though the owner have no cow, is not protected from execution. That if the jury believe all the plaintiff's testimony tend to show, still the plaintiff is not entitled to recover.

The court charged the jury that a two year old heifer with calf, where the owner had no other cow, was a cow within the meaning

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of the statute, and protected from execution. That if the jury believed the lined back cow was turned out as in the bill of sale is mentioned, and the debt remained unpaid by the plaintiff, that cow must be regarded as the property of Knights and not of the plaintiff. To which charge the defendant excepted, and after verdict and judgment for the plaintiff, said exceptions were allowed, and the cause passed to the supreme court for revision.

Swett for the defendant.—In this case three questions are presented.

1. Does the action of trespass lie for taking defendants last cow by virtue of an execution?

2. Is a two year old heifer a cow within the meaning of the statute, and protected from execution?

3. Does the possession of the *lined back* cow under the circumstances which the bill of exceptions shows, operate to prevent a recovery by plaintiff in this suit?

In answer to the first question, all property is *prima facie* liable to attachment. The last cow of the debtor to be sure among other things is reserved by statute, and not liable to be taken and held on execution; but it does not follow of course, that the action of trespass lies against the officer. The persons of parties and witnesses attending court are protected from arrest and attachment, but if they be arrested no action of trespass lies, but an action on the case only. If for arresting the person of a man who is protected from arrest, an action *on the case only* can be sustained, it will be hard to find any reason why an action of trespass lies for taking property protected from attachment and execution.

The officer is not bound in the first case to know the privilege and regard it.—*Salmon vs. Percival*, Cro. Car. 196.—*Tarleton vs. Fisher*, Doug. Rep. 671.—*Parsons vs. Lloyd*. 3 Wilson's Rep. 344.

And from analogy in the last case, is he bound to know this to be protected property?

As to the second question, the general object of the statute was to prevent poor and indigent families from being stripped of the last and only means of subsistence by the act of an unfeeling debtor. The true policy of our law undoubtedly is, to extend the creditor's remedy against the property and restrain it against the persons of debtors. As was said by Prentiss, Justice, in delivering the opinion of the court in the case of *Kilburn vs. Deming*, "On principles of justice the property of the debtor should be subject to the satisfaction of his debts, and the exemption of the statute

ought not to be extended beyond what the policy and humanity of the law clearly require.”

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This statute is in derogation of the common law rights of creditors to secure their debts out of the debtors property, and ought to have a strict construction according to the true intent and meaning of the legislature, if that can be ascertained.—*Buckingham vs. Billings*, 13 Mass. Rep. 85.

The *intent* of the legislature in exempting the debtors last cow from attachment, must have been to secure to his family the immediate means of subsistence.

The *term cow*, by common consent and general understanding, has a meaning well known and which every one comprehends. It means something more than *calf* or *heifer*. No farmer ever talked of and applied the appellation of *cow* to an animal that had never been *productive*. The term denotes in common acceptation both the *species* and *age* of the animal in one sense. But if a two year old heifer can be brought within the meaning of the statute, a yearling may, and a calf; and upon this ground, had Dow possessed *one cow* and a *heifer calf*, the cow might have been seized by a creditor, provided the calf had been left. But I think if the animal has never had the capacity for answering the humane effects of the statute, and cannot be presumed to have at the time, there is no reason for bringing her within it.

As to the third question, Does the possession of the *lined back cow* under the circumstances which the bill shows operate to prevent a recovery by plaintiff in this suit?

Had the *lined back cow* been attached by defendant or any of plaintiff's creditors, neither plaintiff nor Knights could have any remedy, for this sale must be adjudged fraudulent against creditors. The vendor remained in possession, which Lord Coke said in Twynes case is a sign of trust, and renders the sale fraudulent.

The plaintiff, Dow, still retains the use of the cow, enjoying her as his own, and at the same time holding himself out as the real owner, he gives a false credit, and here Knights is aiding and assisting him in thus attempting to practice a fraud upon the world. Knights says, “give me the control of your property against your creditors, and you may enjoy it as ever.”

The rule is, I think, that if after an absolute bill of sale the chattels remain in the vendor's possession, this is fraudulent *per se*, and void against subsequent purchasers and attaching creditors. At all events, the retention of possession must not only be part of the

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contract, but it must also appear to be for a purpose fair, honest, and necessary. Chancellor Kent says in the seventh volume of his commentaries, page 412—

“That the policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute sale, and still continue to be the visible owner,” and that “the law will not inquire whether there was actual fraud or not, but will infer it at all events, for it is against sound policy to suffer the vendor to remain in possession.” Some good reason beyond the convenience of the parties must appear for suffering the vendor to retain possession.—2 Kent’s Com. 413.

On the sale of personal chattels there must be a change of possession, and the retention of possession by the vendor will render the sale fraudulent and void, when the rights of creditors or *bona fide* purchasers are concerned.—*Durkee vs. Mahony*, 1 Aik. Rep. 116.—*Weeks vs. Weed*, 2 Aik. Rep. 64.—*Sturtevant vs. Ballard*, 9 John. Rep. 337.—*Hamilton vs. Russell*, 1 Cranch Rep. 309. *Edwards vs. Harben*, 2 Tr. Rep. 587.—*Ryal vs. Rolle*, 1 Aik. Rep. 167.—*Twine’s Case*, 3 Coke Rep. 80.

In *Weeks vs. Weed*, the court say: “It is also to be observed that where a man who is known to have owned personal chattels still remains in the visible possession and use of them, the world will consider and act upon the belief that he is the owner; a continuance in possession, therefore, after a conveyance, has a direct tendency to mislead and deceive.”

From all the cases cited, the law seems to be settled that possession must follow and accompany the sale, or the conveyance is fraudulent when the rights of creditors are concerned.

If the sale of the *lined back* cow would have been fraudulent in law as to an attaching creditor of Dow, how should that sale and continuance in possession be regarded as effecting the rights of defendant in this case?

If he being a *bona fide* creditor of plaintiff might consider and treat this sale fraudulent and void as against him for one purpose, why not for all?

Had the defendant attached the *lined back*, she would have been claimed on the ground that she was plaintiff’s last cow, and when the defendant has humanely suffered the plaintiff to retain possession of the animal, which has been productive and is of some immediate use in the family, which cow (if this heifer is treated as a cow) the defendant might have attached and sold lawfully as plaintiff’s property, shall these acts of humanity which are for plaintiff’s

benefit and to the detriment of defendant, operate to destroy all of defendant's rights?

And does this act, which is most manifestly for the immediate benefit of Dow and his family, give him this advantage of the defendant which he is calling upon this court to decide he has acquired?

If the *lined back* cow might have been attached by defendant as plaintiff's property, what good reason can be given why she should not be treated as plaintiff's property for every purpose, so far as defendant's rights are concerned?

One reason given why there should be a visible charge of possession upon the conveyance is, that the continuance in possession of the vendor has a tendency to mislead and deceive and induce a belief that the vendor still remains the real owner. Does not this reason apply equally strong in this case as where the property itself is attached? Here defendant supposed he was leaving plaintiff his best and *only* cow capable of affording any benefit at all. He had known her as plaintiff's property, and there was no visible change of possession, and nothing to indicate any change of property. At all events, Knight's claim upon the cow was only in the nature of a pledge or mortgage—he had paid nothing of the debt when this heifer was attached, but so far from that the debt had been nearly extinguished by Dow. This fact alone shows the bill of sale was fraudulent both in law and fact.

Bell for the plaintiff.

The opinion of the court was delivered by

COLLAMER, J.—The first question in this case relates to the form of action; should it be trespass or case. It is insisted that the exemption of *property* from execution is like the exemption of the *person* from arrest; for a breach of which last privilege it has been holden that *trespass* will not be sustained.

For taking property, exempt from execution, *trespass* has ever been the form of action in this state, as the following cases will show.—*Crocker vs. Spencer*, 2 D. Chip. 68.—*Leavitt vs. Metcalf*, 2 Vt. Rep. 342, *Kilburn vs. Deming*, 2 Vt. Rep. 404.—*Spooner vs. Fletcher*, 3 Vt. Rep. 133.—*Try vs. Canfield*, 4 Vt. Rep. 9.—*Haskill vs. Andros*, 4 Vt. Rep. 609.—*Hart vs. Hyde*, 5 Vt. Rep. 328.—*Leavitt vs. Holbrook*, 5 Vt. Rep. 405. After so long and uniform a usage, sanctioned by the court and the profession, we should be slow to adopt a new course not necessary to the rights of the parties, Nor is this difference in the form action

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as to an attachment of exempted *property* and an arrest of a privileged *person* without a distinction in principle. Exemption of a person from arrest is a mere personal privilege which may be insisted on or not, at the time, as the person is always present; and unless the person insists upon his privilege it is considered waived. The law of arrest therefore continues in force even as to such person. In relation to the attachment of property it does not depend on any such condition and could not, with propriety, as the owner is not presumed to be present to insist on the exemption. It is as if there was no law for such an attachment, or levy.

The next question relates to this animal being called a cow, within this statute which exempts a man's last cow from execution. This exemption is charitable and in the cause of humanity and ought to receive a liberal practical construction. The charge was that a heifer with calf where the owner had no other cow is within the exception. This only permits the poor man to call and consider this his *cow* when he has no other more clearly entitled to the appellation. This will involve no such practical difficulties as to uncertainty, where there are other cows, as have been suggested, in argument.

The next question is, had the plaintiff another cow. The lined back cow had by a bill of sale, absolute on the face of it, been sold to Knights. The consideration of that sale was the signing a note for the plaintiff, a part of which he had paid. This would render it a mortgage of the cow to Knights instead of an absolute sale; but still, as between the plaintiff and Knights it was the cow of Knights, who had the right of immediate possession—*Gifford vs. Ford*, 5 Vt. Rep. 532. It is now insisted that the sale, whether absolute or conditional between the parties, inasmuch as the cow was left in the plaintiff's possession was *void* as to creditors and so, as to them, the plaintiff was the owner of the lined back cow. It is, however, not true that this sale is, properly speaking, *void* as to creditors; it is only *voidable* by creditors attaching or purchasing; and this must be by attaching the same property. In the case *Spaulding vs. Austin*, 2 Vt. Rep. 555, it was decided that the non-delivery of part of the property sold only rendered the sale void as to creditors attaching that part, not as to other property, even in the same sale. The *plaintiff* must have been in fact *owner* of the other cow. If a man owns two cows and he sells one for six cents, and delivers possession of it fraudulently in fact to injure creditors, this is a good sale as against him. Now can he never after hold one cow exempt from execution. nor have this

either on the ground that the sale was void as to creditors? Creditors can only say a sale is void as to them when they have treated it as void, and attached the same property. The cow thus sold is not the vendor's cow; it is the property of the vendee, subject to the attachment of creditors. It must be avoided by creditors attaching it or it stands good to all purposes. This is the same whether it be fraudulent in law or in fact.

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Judgment affirmed.

ISRAEL CUTTING, *Qui tam*, vs. JOSEPH STONE.

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—

The laying out and establishing the limits and bounds of a village in these words—"Commencing with Samuel Hall, thence to William Scales, also including John W. Dana, Jason and Warren Britt and Thomas Lyford,"—is uncertain and insufficient.

It must be so described as to include *territory*, with certain outlines and boundaries.

This was an action to recover the penalty of ten dollars given by statute for resisting the plaintiff in driving the defendant's cow to pound, and rescuing her. The cause came by appeal to the county court, and was tried on the general issue joined to the court. On the trial the plaintiff offered in evidence the application to the selectmen of Cabot, which was as follows:

"To the selectmen of the town of Cabot:

We your petitioners request you to lay out and establish a village in said town, to extend from Samuel Hall's to William Scales' and also to John W. Dana's and Thomas Lyford's inclusive, to be hereafter known and designated by the name of Jacksonville; as in duty bound your petitioners will ever pray.

Cabot, Jan. 11, 1834.

(Signed)

ISRAEL CUTTING," and others.

This was objected to by the defendant, but admitted by the court. The plaintiff proved that more than seven of the signers thereto were freeholders in said town, and that there was a village of more than ten dwelling houses. The plaintiff offered in evidence a copy of the town clerk's record of the doings of said selectmen, which was as follows:

"Whereas, application has been made to us by more than seven freeholders of the town of Cabot to set off and establish a village

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in said town—We hereby set off and establish a village bounded as follows, viz: Commencing with Samuel Hall, thence to William Scales, and also including John W. Dana, Jason and Warren Britt and Thomas Lyford.

LEONARD ORCUTT, }
JOSEPH FISHER, } *Selectmen.*
MATTHIAS STONE, }

Cabot, Jan. 20, 1834."

Which was objected to by the defendant, but was admitted by the court. The plaintiff proved that the selectmen only posted up three public notices of their said doings according to law; and there was no other proof than is above stated of the setting out the boundaries or limits of the village.

The plaintiff proved that the defendant did suffer his cow to go at large in the highway between the houses of the persons aforesaid, where she was taken by the plaintiff, who sent two men with her to pound. On the way the defendant resisted them and rescued the cow, February 10th, 1834. The county court rendered judgment for the plaintiff, and the defendant filed exceptions, which were allowed, and the cause came for revision to the supreme court.

Bell and Cushman for the defendant.—1. The defendant contends, that the application to the selectmen to set out and establish a village, required by the statute to be in writing, should upon the face of it show the applicants to be freeholders of said town of Cabot.

2. Said application in writing does not desire or "request" the selectmen to lay out and establish the "*limits and bounds*" of a village, but to "lay out and establish a village." See application, and statute, 456.

3. There is a variance between the description of what is to be considered the *limits and bounds* of the village in the application, and the doings of said selectmen. Jason and Warren Britt are not in the application.

4. The copy of the record should not have been admitted in evidence. The selectmen did not by their return in writing to the town clerk of Cabot set out any definite "limits or bounds" for said village. The extent is uncertain. No extent of territory is included. *Persons* only are embraced in the description.

5. The proof does not support the declaration. There is a fatal variance.

The declaration alleges, that plaintiff was driving the cow to pound.

The evidence is that two other men were driving said cow.

The declaration alleges that defendant rescued the cow from plaintiff.

The evidence proves that defendant rescued the cow from others.

This is a *material* and *fatal* variance. For as penal statutes are to be strictly construed, and as by the statute the person injured by the rescue only can prosecute, the plaintiff cannot maintain this action unless *he* was driving and the cow was rescued from *him*.

The maxim, "that what one does by another he does by himself," does not apply in this case.

Our statute makes it penal to resist an officer, but no one is subject to the penalty for resisting the agent of the officer.

Davis for the plaintiff.—By an act passed Nov. 11, 1819, the right of impounding neat cattle was extended to the case of persons, who, residing within the limits of villages of a certain number of houses, laid out and established as in said act prescribed, should suffer them to run at large. If, agreeably to the provisions of this act, a village was legally established in Cabot previous to Feb. 10, 1834, and if the defendant suffered his cow so to run at large, he then living in said village, and if the plaintiff, on taking her up and attempting to drive her to pound, was resisted by defendant, a case is made out to recover the penalty under the general laws referred to.

All these facts, except such as depended upon written documents alluded to in the bill of exceptions, and which go merely to the fact of the establishment and due notification of such village, were found by the court in favor of the plaintiff, and are consequently not now open to controversy. The papers are,

1. The application of more than seven persons, proved to have been freeholders in said town, to selectmen.

2. The copy of the proceedings of the selectmen in the matter, as placed on record in the town clerk's office.

3. The notification, triplicates of which were posted up by the selectmen within the village, as required by the second section of the village law.

These papers were all objected to by defendant on trial, and the only questions then made, and we suppose the only ones which will now be made, relate to the regularity and adaptation to prove the fact of the establishment and public notification of the village.

As to the first and last, they may be disposed of in few words.

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There was probably no occasion to have offered the application, as that is not required to be made a matter of record, and it is to be presumed as stated by selectmen as the foundation of their proceedings. There seems to be no objection to the notification, other than such as applies to and constitutes the principal one to the paper number two, which was, that it does not lay out the limits of said village with sufficient certainty and clearness to be valid against any one.

It is true that it is not laid out by points and distances, so that its exact boundaries could be ascertained by compass and chain, but the plan we submit, accompanied by the explanation of one of the selectmen, will leave no doubt that, for all practical purposes, the limits are sufficiently ascertained, particularly on the main street running north and south, on which the defendant resided, and in which, between Hall's and Scales' houses, the cow was suffered to run at large.

It would be useless to inquire into the precise limits east and west, or on any other points between those and the other cardinal points, or whether the tract laid out be circular, or elliptical, a square or parallelogram. If this kind of accuracy be insisted upon, we should be obliged to pronounce the treaty between Great Britain and her revolted colonies in 1783, acknowledging the independence of the latter, void and of no force, because it failed to define with any certainty our limits on our north-eastern and north-western frontiers, difficulties which, after more than fifty years fancied enjoyment of national existence, are still unremoved. Have New York and New Jersey, for this forty years, had no existence as states of this Union, because until very recently it has not been ascertained where the boundary line runs between them?

In fine, how many school districts are now constituted or changed in extent by transferring A. B. or C. D. from one to another, meaning thereby to include in the transfer the farms owned by such persons; and would any one about whose position no doubt can be entertained think of questioning the fact of the existence of such district because of a disputed boundary to such farm?

The opinion of the court was delivered by

COLLAMER, J.—The statute of 1819 provides, that the selectmen, on proper application, are to “lay out and establish *the limits and bounds*” of the village. It forbids, under somewhat severe penalties, the permitting cattle, horses, geese, &c. to run at large within said bounds, and permits the impounding horses and cattle to enforce the penalty.

It is obvious that the bounds should be definite and distinct, and the words of this statute are more explicit than those which relate to the liberties of jail yards. Much liberality has been indulged in relation to *descriptions* in deeds, but even there it has been considered necessary to have so much of description as that a surveyor could, with persons to identify landmarks and localities, survey out the *tract* of land. The words "bounds and limits" in the statute clearly imply that there shall be set out and described a territory, a tract, a certain superficies with distinct boundaries; and the security of the community against penalties and forfeitures imperiously demands this. Here the description is—"Commencing with Samuel Hall, thence to William Scales, also to include J. W. Dana, Britt and Lyford." Whether Hall and Scales are inclusive or exclusive, is uncertain. Even if we were here to say these *persons* meant their *houses*, yet it includes no certain territory. It names some *lines*, which *enclose* nothing. No two surveyors could, by this description, survey out the same tract. This is not setting out *limits and bounds* as the statute, and the public safety, require; and if it was not binding on all persons, it was not binding on the defendant.

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Judgment reversed.

ORLEANS COUNTY.

MARCH TERM, 1835.

PRESENT, HON. STEPHEN ROYCE, }
 " " JACOB COLLAMER, } *Assistant Justices.*
 " " JOHN MATTOCKS, }

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 March,
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JONATHAN CHASE vs. JOHN L. DAVIS.

Dictum—A petition for a new trial under the statute of 1829 is addressed to the discretion of the county court, and a refusal to allow it or a dismissal of the same, on hearing, cannot be revised by exceptions, as on error, by the supreme court.

The receiving and entertaining a dilatory plea, contrary to the *rules of practice* in the county court, cannot be assigned for error or be revised in the supreme court.

An original writ of summons cannot be served *by reading*, without copy.

In case the citation attending such petition be not served by copy, the petition cannot be sustained.

This was a petition addressed to the county court, representing that the petitionee had, before a justice of the peace, recovered against the petitioner a judgment by default unjustly; the petitioner having by accident and mistake, attended said court on a wrong day, and that manifest injustice had therein been done the petitioner, especially in the assessment of damages; and praying for a new trial. A citation in due form of law attended said petition, but the return of the officer thereon was, that he served the same by reading the same in the hearing of the petitionee.

At the county court, on the fifth day of the term, and without any special leave of the court had for that purpose, Davis filed his motion, in writing, to dismiss said petition on account of the manner in which the citation was served. He also, by leave of court, and without prejudice to his motion to dismiss, filed his demurrer to said petition; and both were heard together by the court.

The petitioner relied on the rule of the county court, which required all dilatory pleas to be filed by the opening of the court on the second day of the first term. It appeared that Story and Weed had entered an appearance for Davis on the first or second day of the term, and the counsel for the petitioner insisted that the appearance of the petitionee by his counsel in season, and this followed by a neglect to plead in abatement, operated to cure any defect in the service. The court adjudged that the motion to dismiss should prevail, and dismissed the petition; to which the petitioner excepted, and the cause passed to the supreme court.

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Starkweather for the petitioner.—1. This motion ought not to be entertained, because if the service be defective, it is the ground of a dilatory plea, which by the rules of the county court must be filed with the clerk by the opening of the court on the second day of the first term.—Rule 3d. And the party having entered a general appearance upon the docket, should not by his own neglect annul the rules of the court and thereby take the other party by surprize. Hence the defect, if any existed, is waived and defendant estopped from moving this question.—*Tucker vs. Stark and Bell*, Bray. Rep. 191. Courts have no favors to extend to dilatory pleas or motions partaking of that nature.—1 Chit. Pl. 444. *Hixon vs. Binns*, 3 Stor. Pl. 186. *Haworth vs. Spriggs*, 8 T. R. 515. *Roberts vs. Moore* 5 T. R. 487–8.

2. But it is contended that the service is good in point of fact. The expression of the statute is, that the petition and citation shall be served on the adverse party in the same manner as original writs are by law served.—Stat. of 1829, p. 4, proviso of 2d section. It is to be noticed that no particular class of original writs is pointed out; therefore if this petition be served in such a manner as would be good in the service of any original writ, it comes within the letter as well as the spirit of the statute. But original writs are served in a variety of ways, and the decisions all go to show, that, so far as mere service is concerned, it is only to give defendant notice of time and place of holding the court, that he may attend and assert his rights; which is the only benefit defendant can derive from the service; all of the other provisions are for the benefit of the plaintiff, and if by him omitted, inasmuch as defendant is not prejudiced, he has no business to complain; and hence it follows, that whenever defendant has notice either by copy, reading in his hearing, or having a view of it and accepting service, it is perfectly good, whether the writ issue as attachment or summons.

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For it has been decided, that an acknowledgment of service on a writ of attachment is sufficient to hold defendant to trial.—*Brewer et al vs. Story et al*, 2 Vt. Rep. 283. Again, it has been determined, that if a writ of attachment be served by leaving a copy with defendant, this will operate as a summons and hold defendant to trial.—*Brewer and Emerson vs. Story et al*. 2 Vt. Rep. 281. 1 Swift's Dig. 611. And again, that the reading of an attachment is good service.—1 Swift's Dig. 611. And also, that the service of a summons is good by reading.—1 Swift's Dig. 589.

Story and Wead for the petitioner.—All acts in derogation of the common law rights of the creditor are to be construed strictly. *Paine vs. Eli et al*, 1 D. Chipman's Rep. 1. 'The act in question certainly takes away the common law right of creditor to collect his debt, and enables the debtor, by a slight variation from the truth, which the humour of the times and the custom of the country will justify, to avoid the payment of a just debt for a greater length of time than reason or equity will warrant. In order then to the jurisdiction of the court, it was necessary that every part of the act should be strictly complied with. The act says that no such petition shall be sustained, unless the same, together with a citation annexed thereto and signed by the chief judge of said court, shall be served on the adverse party *in the same manner that original writs are by law served*, at least twelve days before the session of the court to which such petition is returnable, (Act of 1829, p. 4,) and the law is, that all writs of summons shall be served by leaving with the defendant a true and attested copy of the writ or process with the officer's return thereon.—Rev. Stat. 64. The process in this case was served by reading only and *no copy* was left with the defendant as the act directs. The court was bound to dismiss the cause at any stage of it, when it was ascertained that they had not jurisdiction of the subject matter.—*Chittenden vs. Hurlburt*, 1 D. Chipman's Rep. 384. The neglect to plead in abatement does not operate to cure the defect when the court have not jurisdiction of the subject matter.—*Eaton vs. Houghton*, 1 Aiken, 380. The rule is, that such defects as might be *amended* are aided by the plea to the merits, but not such defects as would be fatal at any stage of the suit.—*Glidden vs. Elkins*, 2 Tyler, 219. The plaintiff's writ must show that the court to which he applies has jurisdiction of his action; at least the contrary must not appear.—*Bates vs. Downer*, 4 Vt. Rep. 178.

The counsel on both sides also argued the demurrer to the petition.

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The opinion of the court was delivered by

COLLAMER, J.—This petition, like any other petition for a new trial, is addressed to the sound judicial discretion of the court. It was for the county court to dismiss the petition or to grant it on such terms as *the discretion of that court* might dictate. It is clear that the discretionary power of our court cannot be exercised by another, or be revised by a proceeding in error; and therefore this court cannot pass upon the merits of this petition, on demurrer. But if the court below, on an interlocutory question, which was really a question of law, dismissed the petition and refused to exercise its judicial discretion upon the merits, that proceeding may be reversed and the cause remanded to the county court for further proceeding.

It appears there was a motion to dismiss for irregularity of service, which it would rather appear the county court sustained and therefore dismissed the petition. No objection is taken to its being in the form of a *motion* rather than a plea; and probably motion was the right form, as the matter was apparent of the record; and had it been a plea, there might have been an issue to the jury and a verdict, which would have been an anomaly in the law of petition for new trial. It is however insisted, that this was, in substance, a dilatory plea and put in after the rule in the county court for such pleas had expired. The rules of practice of each court are of their own formation, and to be by them enforced or dispensed with, in their own discretion, and on such terms as they may choose to impose. The county court, by entertaining this motion or plea out of the time prefixed by their own rule, have disregarded no *law* and committed no error which can be revised by this court. But the parties here and the court below obviously put this question on entirely different ground, which we will now examine.

By the statute of 1829, a citation in a case like this is required to be served "in the same manner original writs are required by law to be served." Original writs, if attachments, must by law be served by the attachment of property or the arrest of the body, or if served by copy only, they amount to a summons. A writ of summons must be served by copy. Our statute is most clear and imperative.—Stat. p. 64. That service by reading only will not answer has been too often and uniformly holden, especially in re

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lation to warning out paupers, to be now questioned here ; however the law may be in Connecticut, as laid down by Chief Justice Swift. This citation not having been legally served, what was the effect ? By this same statute of 1829, it is provided, that unless the citation be so served, *the petition shall not be sustained*. Here the legislature were not content to provide for the mode of service and then leave the consequences of failure like other cases. Nor have they, like the cases of want of recognizance or want of joining the defendant's landlord in ejectment, merely provided the writ should *abate*. They did not leave it to rules of court, or analogies of practice ; but provided by express statute, paramount to rules of court, that *the petition should not be sustained*. The petitionee might have remained absent, and the court could not have proceeded. Being under no obligation to appear, his appearance cured nothing, and he was not within the rule of court. Nothing short of directly submitting the merits to the court by plea could have cured the error.

Judgment of the county court affirmed.

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THE STATE'S TREASURER vs. CHARLES SEAVER *et al.*

A bond of recognizance, taken by a judge, conditioned for the appearance of a prisoner at the next county court, when the cause has gone on exceptions to the supreme court, is void, notwithstanding the cause afterwards came to said county court for new trial.

This was an action of debt on a recognizance for the sum of one thousand dollars, taken by a judge of the county court. By the declaration it appeared in substance that Charles Seaver was indicted, and on trial was found guilty at the August term of Orleans county court, 1830 ; exceptions were filed to the charge of the court which were allowed, and the cause was passed to the supreme court to be holden in March following. In September 1830, this recognizance was taken, conditioned that said Charles, then in prison, should appear before *the county court* then next to be holden in April 1831, and there answer, &c. At the March term of the supreme court a new trial was granted for error in the charge of the court and the cause was remanded to the court for trial at the April term 1831 ; but Seaver made default, and did not appear.

To this declaration there was a general demurrer. The county

court rendered judgment that the declaration was insufficient, to which the plaintiff excepted, whereupon the cause passed to the supreme court.

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Redfield, for plaintiff.—This being a general demurrer to the declaration, the only questions raised are as to the validity of the recognizance upon which this suit is predicated. This was a recognizance taken by a judge of the county court in vacation, after verdict against the respondent, on an indictment for subornation of perjury, the county court having under the act of 1828, certified questions of law arising on the trial, and permitted those questions to pass to the supreme court.

The first question is, “had the judge any authority to take recognizance in such cases. For if not the recognizance is clearly void. This question must be determined by reference to the early statutes, for the statutes of ’24 and ’28 changing the criminal jurisdiction of the courts, do not attempt to enumerate the cases in which recognizance may be taken, but only prescribe the form of taking. The revised statute, page 69, section 39, it is enacted, “That when any person shall be confined, for *any bailable offence*, triable before the supreme or county courts, any judge of the county court shall have power to bail the prisoner by taking recognizance,” &c. There would then seem to be no doubt of the authority of the judge to take recognizance in this case. It cannot be argued that this provision was not intended to reach and does not reach this case. We might as well exclude any other or every other case from its provisions. The humane spirit of our laws requires that all offences should be bailable until after final judgment. A verdict concludes nothing, as was apparent in this case, where a new trial was granted.

2. It is insisted that although the judge had authority to take the recognizance, he has not taken it in the prescribed form, and that it is void for that reason. It is said the recognizance should have been “made returnable to the *supreme court*.”

On a comparison of all the statutes upon this subject, it would seem that so far from this being true, the recognizance must have been *void* had it been so taken. The section last referred to was enacted under a different organization of the courts, from that which obtained at the time of taking this recognizance, and its provisions, so far as the form of the recognizance is concerned, have not only been changed, but virtually repealed by the act of 1824.—R. L. page 121, section 10. This section provides that “all recognizances

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taken by *any* judge or justice of the peace shall be *made returnable before the next county court.*" And the statute of 1828 upon this subject, section 2, provides, "That no such recognizance shall be discharged by reason of the continuance or removal of any cause to the supreme court," and "that the neglect of the respondent to appear when called in either of the courts aforesaid shall be a forfeiture." From a just comparison of those enactments, it is at least questionable whether the recognizance would not have been void had it been taken in any other form. Surely it would have been void had it been taken for the supreme court only. It would be saying too much, to assert that we may disregard these recent statutes, which are so explicit, and resort to the unintelligible phraseology of the old statute. It cannot now be said that any criminal cases are properly *triable* before the supreme court. These courts are now virtually blended. A criminal case is clearly triable where the jury pass upon it. They are here judges both of law and fact. The court are mere advisers. They are to see that no wrong is done the respondent, but they are clearly not the *triers*. A criminal case is virtually always in the county court. The questions of law are certified to the supreme court, and they certify their opinion to the county court, but have no power to try the case. The county court "respite sentence and stay execution," and the case is clearly not in the supreme court to be *tried*, but certain parts are there to be *revised*, and not even this until the session of the supreme court. The case is still pending in the county court. The respondent is in the custody of the officer, by virtue of an order from the county court, and he holds the respondent, as the officer of the county and not of the supreme court. The legislature with this view of the subject have required *all* recognizances to be *made returnable to the county court.* And although it might be true in this case, that it was competent for the judge to have inserted in the recognizance a condition to appear at the county or supreme court, it clearly was not required, and the act of 1828 seems to have been passed expressly to meet the case of such a recognizance.

But had the law expressly required that the recognizance should be made returnable to either or both of these courts, it is difficult to see how the connusors could take advantage of an omission which was for their benefit.

Had the bond required more than the law, or any thing different from the law, it would have been clearly void as in the Connecticut case, 7 Conn. 236, *Billings vs. Avery*, where in addition to

the usual condition, the respondent bound himself to keep the peace; and all the cases in the books are of this character; but the mere admission of one alternative of the condition, which in the event became of no consequence, cannot upon any principle of analogy to official bonds or recognizances, affect the validity of the obligation. Could it be said this holds true of the recognizances taken from public officers, or in cases of bastardy? I think few lawyers will pretend it. *Waldo vs. Spencer*, 4 Conn. 71. But if the plain and reasonable enactments of the statutes upon this subject are to be regarded, this suit must be sustained. It has always been held that a voluntary bond or recognizance, not requiring any thing against law is valid.—*Young vs. Shaw*, 1 D. Chip. 226.—*Cloff vs. Cofran*, 7 Mass. 98,—Cited Big. Dig. 127.

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Fletcher for the defendants.—1. Are the conditions of this recognizance in strict accordance to the statute. If they are not then the bond of recognizance is void.—*Lyon vs. Ide*, N. Chip. Rep. 49, 52.—*Commonwealth vs. T. Morey*, 8 Mass. 78.—*Commonwealth vs. Laveridge*, 11 Mass. 337.—*Commonwealth vs. J. Ward*, 4 Mass. 497.—*Reinolds vs. Smith*, 3 Petersdorf, 22.—*Moor vs. Finch*, 3 Petersdorf, 33.

Previous to the taking of the recognizance the cause had been received into the supreme court. The records in contemplation of law were there. The county court had no longer jurisdiction or control of the action. It was for Seavers appearance at that court at their next stated term in March 1831, that he stood committed for his appearance. It was in that court Seaver's trial was to be had. It was there he was bound to appear. It was in that court the sheriff was to have him. And it was in that court, and that only, the statute authorized the judge to recognize him to appear.

It was to that court the bonds of recognizance could only be returned, and be made a matter of record. Wherever the original action and the records are they draw to them all the incidents. The recognizance is but incident to the action in which it is taken, and to be obligatory should have been returned to the supreme court where the original action was pending, and there have been made a matter of record. But it was taken and made returnable to the county court. The county court could not take jurisdiction of this bond of recognizance and make it a matter of record, for the original action was pending in the supreme court. The supreme court could have no jurisdiction of the recognizance and make that a matter of record, because the recognizance was not

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made returnable to that court. If the county court had no jurisdiction of the recognizance when it was first entered into, it did not become obligatory by the cause being sent there afterwards for the act of the supreme court in granting a new trial and remanding the cause to the county court could not make the recognizance obligatory, if it was void in its creation. What would have become of the recognizance if the court had sustained the charge of the judge to the jury. No action could have been sustained upon it. The county court could not by *certio rari* have brought the record of the supreme into the county court. If the supreme court had ordered the bond of recognizance into their court they could not have proceeded upon it, for the condition of it was not that Seaver should have appeared at that court but at the county court. It is novel that the records of the cause should be in one court and the bond for the appearance of respondent in another. This practice would be manifestly irregular. As well might the conditions of the recognizance have been for the appearance of Seaver at the probate court or before a justice of peace or any other court. The court before which the bond of recognizance is made returnable, and before which the prisoner is bound to appear, must at the time the recognizance is entered into have jurisdiction of the action and of the prisoner, or the recognizance is void. Had the conditions of the recognizance entered into by Seaver at the April term of the county court been that Seaver should have appeared before the supreme court at March term 1831, thus passing over August term of the county court, anticipating that the cause would pass to the supreme court, and as it did in fact, would the recognizance have been obligatory. By no means; for at the time of entering into it, the supreme court had neither jurisdiction of the respondent nor of the action, nor was there any legal certainty they ever would have. The recognizance is void, because it was not taken in conformity to the statute. It was not taken for the appearance of the prisoner before the court where the trial was to be had. It was not taken for the appearance of the prisoner before the court at which by law he was bound to appear. It was not made returnable to the court which had jurisdiction of the case and of the prisoner. The recognizance is incident to the action, and must follow it as an appendage, or it is void. It is taken to secure the personal appearance of the prisoner to receive sentence in case the court award it, and if otherwise taken is absolutely void. It was a matter of legal uncertainty whether the cause would or would not be remanded to the county court; and its having been sent back

does not cure the irregularity and make that obligatory which in its creation was void. Every thing is to be presumed in favor of bail. They are the favorites of law and never to be charged unless by its strict operation. To charge them is often to visit the iniquities of others upon them, which is oppressive and unjust. The offender is often a son, a brother, or a particular friend, for whom they feel the greatest sympathy or charity until he is found guilty. This is the case under consideration, and the court will not charge them unless the law is imperative.

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The opinion of the court was delivered by

COLLAMER, J.—A recognizance is an incident and attendant on a suit or prosecution, taken to secure and enforce some *duty*, previously existing. The duty must have existed *by law*, and if the duty is created *by the recognizance*, or, in other words, if the recognizance requires more than the law, it is void.

By the statute of 1828 on exceptions being taken and allowed to questions arising on jury trial in a criminal case, the county court are not to render judgment, but the cause is “to pass to the supreme court for final decision,” and the supreme court are to render judgment and cause execution thereof, or by said court the cause may be remanded to the county court, if necessary, for a new trial. The record and the whole papers pass from the county court where exceptions are allowed, and no cause remains in that court. No *scire facias* could issue from that court on any record of the cause then, nor could that court any more require the prisoners attendance or appearance before that court. It had become the duty of the prisoner to appear before the supreme court. This recognizance then in requiring the appearance before the county court required what was not then a legal duty of the prisoner, and attempted an incident to the records of a court which had no files or records of such a case as then an existing cause in that court.

It is urged that this recognizance is taken agreeable to the statute of 1824. By the statute of 1797 bond was to be taken for appearance to the supreme or county court as the case might require; as each court had their criminal jurisdiction. By the statute of 1824 the recognizance was for appearance to the county court only, as that court only had then any criminal jurisdiction. By the statute of 1828, as already shown, jurisdiction was again given to the supreme court. By this the same state of circumstances arose as required the bond to be taken as by the statute of 1797 and to that should it conform.

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If the recognizance was not good when taken no subsequent contingency would render it good. Hence the subsequent result that the supreme court granted a new trial and remanded the case to the county court for trial could not effect this recognizance, previously taken. Should a justice of the peace recognize a criminal to appear at the supreme court instead of the county court, would it not be void? And if void, it would not be revived and set up by the happening of the subsequent contingency of the case going to the supreme court on exceptions.

As to the second section of the statute of 1828 it obviously relates entirely to recognizances taken for appearances at the county court in the first instance, and legal when taken and providing they shall not be discharged by subsequent continuances or by the cause passing to the supreme court. This does not relate to a bond illegal in its inception.

Judgment affirmed.

ESSEX COUNTY.

MARCH TERM, 1835.

PRESENT, HON. STEPHEN ROYCE, }
 " " JACOB COLLAMER, } *Assistant Justices.*
 " " JOHN MATTOCKS, }

MAIDSTONE vs. RICH STEVENS.

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The action of *ejectment* for the non payment of rent against a lessee may be sustained under any statute without a demand of the rent, though the lease was executed before the statute.

The lease, in terms, giving the right of entry only after the rent in arrear "shall have been *lawfully demanded*," does not alter the case.

Receiving of rent, subsequently, does not waive the right to sustain this action, unless it be shown that the receiver knew of the arrear rent at the time; and the rent received, to have this effect, should have accrued after the forfeiture existed or the action commenced.

This was an action of ejectment for a certain school lot in Maidstone. On the trial it was conceded, that the defendant was in possession of the lot as an assignee of a lease, executed by the selectmen to J. Smith, May 1, 1797, and assigned to the defendant; in which lease was reserved an annual rent, payable to the selectmen on the first day of May, and a right of re-entry in case said rent should at any time remain over due twenty-eight days, "*being lawfully demanded*." The plaintiff introduced testimony tending to show several years rent in arrear, and that the defendant had been frequently requested to pay up the same, though no particular sum was specified in said demands. That one of the selectmen, on the day of the date of the writ in this case, requested the defendant to pay up all the rent in arrear, not specifying how much. This was May 16, 1833. The defendant read in evidence two receipts, each signed by one selectman, only; one for the rent in full for 1829, dated May 25, 1830, and the other dated May

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10, 1833, for the rent of 1833. The plaintiff gave evidence tending to prove that several years rent was still due.

The defendant requested the court to charge the jury, that the plaintiff was not entitled to recover, unless he proved the rent in arrear had been demanded on the premises, and the true sum due, or the year, specified in the demand; and further, that receiving the rent specified in said receipts was a waiver of any right to maintain this action on account of any of the rents due previous to said receipts.

The court charged the jury, that no demand of the rent on the premises, or specifying the true sum due, or the year, was necessary to entitle the plaintiff to recover;—that the receipts furnish evidence not only that the sums therein mentioned were paid, but also a presumption that previous rents had been paid; but this presumption was subject to being rebutted by proof;—that the receiving said rents and giving said receipts by the person who signed the same was not alone a waiver of the right to maintain this action for any previous rent unpaid, without proof that said person giving said receipt was then knowing the existence of said arrear;—that if the jury were satisfied that the plaintiff had by testimony rebutted said presumption of payment arising from said receipts, and convinced the jury there was rent in arrear at the commencement of this action, which had accrued since the defendant went into possession as assignee, they would find for the plaintiff; otherwise for the defendant. To which charge the defendant excepted; and verdict and judgment being rendered for the plaintiff, the exceptions were allowed and the cause passed to the supreme court.

Fletcher for the defendant —The statute of 1818, p. 109, does not vary or control the conditions of this lease. The lease was executed in 1797. The construction of its covenants and conditions is governed by the rules of the common law.

By the terms of the lease, before right of re-entry accrues, there must be a demand of the rent in arrear, and this demand made conformable to law. We have then to inquire how and in what manner the common law prescribes that a demand shall be made by the landlord of the tenant of rents in arrear, to justify the landlord to enter upon the premises for non payment of rents.

1. The first inquiry then is, what is necessary for the landlord to do to give him a right of entry?

(1) There must be a demand of the rents in arrear.

(2) It must be made on the premises.

(3) It must be made on the day the right to demand accrues.

(4) It must be of the sum actually due.

Esp. Ev. 200. 1 Saund. 287. Saund Pl. and Ev. 574. Cok. Lit. 202. Stat. 109, sec. 2, implies it.

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2. Where the lease expresses an agreement for notice, the time, mode and manner must conform to it.—Saund. Pl. and Ev. 574. Peak's Rep. 5. 6 Esp. Rep. 10. 1 Saund. 555.

3. A right of entry may be waived by omitting to make demand for rents in arrear, or accept subsequent rents, or distraining, &c. 1 H. Bl. 311. Saund. Pl. and Ev. 576. Esp. Ev. 203-5.

The plaintiff proved a demand, but not on the premises, nor of any specific sum, nor for any particular year. He had accepted rent for the current year next preceding the one in which the action was brought. The rents demanded accrued antecedent to 1833.

The court charged the jury that the plaintiff might recover, though he did not demand the rent on the premises, or specify the sum demanded, or the particular year for which the demand was made. In omitting to charge as requested, and instructing the jury as stated in the bill of exceptions, it is respectfully submitted that there is error.

Cushman for the plaintiff.—Plaintiff contends, it is not necessary that the rents due should be demanded on the premises leased, or that the precise sum due at the time of the demand should be named. A request from either of the selectmen to the person liable to pay the rents, to pay, whatever may be due at the time of the request, is all the demand which can be required. Indeed, our statute of 1818, p. 109, makes *any demand unnecessary*.

Did the receipt for the rents of 1823, by one of the *selectmen*, discharge the defendant from all liability for rents due and unpaid the previous years, while the defendant was occupying and improving the premises as assignee of the lessee?

The defendant contends that it does not. The land was leased by a board vested with power to lease by statute. The act of one of the board is not the act of the board. A majority must act. A lease executed by one would be invalid. A rent by one is not binding on the town.

The rents should be paid into the treasury of the town.

A payment of the amount of the rent to one of the selectmen constitutes the person receiving it the *agent* of the *lessee* for the purpose of delivering the rents over to the treasurer; and if the

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rents are thus paid, and received by the town, the rents are discharged, and not otherwise.

2. The common law does not regard the payment of rent for the last year as a discharge from the payment of previous arrears of rent due. By the statute of 4 Geo. II. ch. 28, sec. 2, it is provided, that when ejectment is brought for the forfeiture of a lease for non payment of rent, the acceptance of rent last due is a waiver of the penalty or forfeiture.

But the doctrine of that whole case, in relation to the *effect* that receipt of rent has upon a previous notice to quit sustains the position I contend for in this case. With what *interest* was this rent paid and received? What was the real *intention* of both parties? These are facts which should be left to a jury. The landlord must have *notice* of the *forfeiture*, or receipt of rent cannot be regarded as a waiver of the forfeiture.—Cowper, 803. 2 Stark. 535. 2 T. R. 245, *Roe vs. Harrison*.

The reason on which the law rests, (on which the defendant relies,) is done away by our statute, p. 109, and does not exist in this state, and “when the *reason* ceases the law ceases.” The doctrine of *forfeiture* does not apply here. In England, if tenant neglect to pay rent, he forfeits his interest and the lease is determined.

Here, at any time before final judgment in the action of ejectment, tenant may pay rent and costs and continue to enjoy the benefit of his lease.

If the rents may be paid to one selectman, it follows of almost absolute necessity, that the doctrine contended for by defendant cannot prevail.

Our selectmen being annually appointed—a board constituted of a number of individuals, (“not less than three nor more than five,”) the individuals of each year could not be supposed, (from the tenure of their office and the nature of their duties) to have any knowledge whether all rents had or had not been paid.

In this case the *terms* of the rents indicate the *objects* and *intent* of defendant, and the individual selectman who executed them. It was never intended as a waiver of any right.

The opinion of the court was delivered by

COLLAMER, J.—This lease gives the right of entry for the non-payment of rent which has been due 28 days. What is said in the lease about the same having been *legally demanded* is unimportant, as the same would have been necessary by the common

law, under which the lease was executed, without these words. They were expletive when inserted and so remain. By the common law, where there was a right of entry for the failure to pay rent, it was viewed and enforced by the action of ejectment as a *forfeiture* of the tenant's estate, and therefore the utmost strictness was required on the part of the landlord in performing all the requisites on his part in asserting his legal rights, like the performance of conditions precedent. The demand of the rent must have been made on the true day when due, on the premises, at the most public place thereon, by the landlord or his attorney appointed in writing. And when the forfeiture was legally taken, the right of the tenant was viewed as forever gone at law, and the ejectment was sustained accordingly. To relieve the landlord from this strictness of proceeding on the one side, and the tenant from its effects on the other, the statute of 4th Geo. II. was passed, by which the action of ejectment was given for the non-payment of rent without demand on the part of the landlord, and it granted the tenant the right, by paying up the rent and costs in six months after judgment, to retain his estate. By our statute of 1818, (Stat. 109,) it is provided that the action of ejectment for the non-payment of rent may be sustained without proof of demand, and the tenant may have all the proceedings arrested by paying up before final judgment. These statutes create no new duties or obligations, and *do not impair the obligation* of any contract. The statute but gives a new and more simple remedy for an existing right, and in so doing secures mutual and reciprocal advantages to both parties. It is under this statute this action is sustained, without a formal demand on the one side, and with the right to pay up and retain the estate on the other.

It is next insisted, that inasmuch as the defendant paid up the rent of 1833, which was received by one of the selectmen, this action could not be sustained on account of previous rent being unpaid, even though that selectman did not know of the existence of said arrears. It is true the receiving of the rent of 1833 raised a presumption that the previous rents were paid, but this was subject to being rebutted, which was done to the satisfaction of the jury. The receiving of rent *eo nomine*, accruing after a forfeiture, is a waiver of the forfeiture, as thereby the landlord elects to treat the holder as *tenant*, and not as a *tortfeasor*. But in such case it must be substantially shown that the forfeiture was *known at the time*.—*Roe vs. Harrison*, 5 T. R. 425. In this case the rent for 1833 was received by one of the selectmen. It is very doubtful

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whether the selectmen, especially one of them, being a board with limited powers, could by express contract waive the plaintiff's right, only receiving therefor payment in part. In this case it would be doing the utmost violence to the intent of that selectman to give such effect to his receipt. There was no proof that he had any knowledge of there being any rent in arrear. This is not an action for a *forfeiture*. That should have been taken by the strict rules of the common law. This is an action given by statute. The non-payment of rent is a breach of a *condition subsequent*, and does not in itself divest the estate. That depends on the forfeiture being insisted on by the landlord and taken with exact precision as before stated. The rent must have been demanded on the true day, and it was only after such demand that the tenant became a *tortfeasor*. To waive such forfeiture, rent must have been received from the tenant, as rent, which accrued *after such demand*. By statute this action is given without demand. The defendant only becomes a *tortfeasor* after suit commenced. To waive this, the landlord must receive rent accruing *after suit*.

Judgment affirmed.

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B held certain promissory notes against W, which were secured by a mortgage on real estate. These notes were afterwards given up to W, upon his executing new notes for the sum due, but without any intention on the part of B to affect his mortgage security. *Held* that this exchange of notes did not defeat the mortgage, so as to enable the creditors of W to levy upon and hold the land against B:—especially, as it did not appear that they had been misled, or induced to believe the mortgage debt actually paid.

This was ejectment for a tract of land in the town of Plymouth. On the 5th day of November 1829, one Timothy Wetherbee conveyed the land in question to the defendant Binney, by a deed of mortgage duly acknowledged and recorded, conditioned as follows:

“Providing nevertheless, and the above deed is given on this condition, that whereas the said Timothy Wetherbee has this day made, executed and delivered unto the said Moses Binney four notes of hand, bearing even date with these presents, for the sum of three hundred and fifty dollars, to be paid at different times:—the first note for one hundred bushels of wheat, on interest, payable in the month of January 1831, if I raise it, and if not, what I do raise and the rest in cash:—the second note for eighty-four dollars and interest, to be paid on the 5th day of November 1832:—the third note for eighty-three dollars, and interest to be paid the 5th day of November 1833:—the fourth note for eighty-three dollars and interest, to be paid on the 5th day of November 1834. Now in case the said Timothy Wetherbee, his heirs, executors, or administrators shall pay or cause to be paid each of said notes to the said Binney, his heirs, executors, or administrators, when the same becomes due, and in all things agreeable to the tenor of said notes, upon that condition the foregoing deed shall be void, otherwise be and remain in full force and virtue.”

It appeared that previous to the 4th day of January 1831, sundry payments were made on the notes aforesaid, which reduced the amount then due to about the sum of \$313;—that on that day said Wetherbee executed to Binney three new notes of that date for the balance aforesaid, all payable in wheat at one dollar per bushel, if he (Wetherbee) should raise it, and otherwise what he should raise, and the rest in cash. These notes were also on interest, and made payable in the month of January 1832, 1833 and 1834. On the receipt of these notes those described in the mortgage deed were given up to Wetherbee and cancelled. No payment of the new notes was shown. Soon

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after this exchange of the notes Wetherbee expressed his opinion to others, that the mortgage was thereby defeated; said he understood it so at the time of doing the business, but did not suppose Binney had any such expectation.

The plaintiffs claimed by levy of an execution in their favor against Wetherbee, made after the execution of said new notes to Binney.

The county court received evidence showing the renewal or exchange of notes in the manner above stated, and the defendants obtained a verdict. To this the plaintiffs filed exceptions, and brought the cause into this court.

E. Hutchinson for plaintiffs.—There can be no doubt of plaintiffs' right to recover, unless done away by the evidence put in by defendants, which was objected to on trial, but admitted by the court.

The defendants then gave in evidence the mortgage deed, above referred to, and certain notes, every one of them varying in date, amount, and mode, and time of payment, from those described in the condition of the mortgage, accompanied with *parol proof*, by which they offered to show that the said Wetherbee fraudulently procured the mortgage notes given up in exchange for the notes offered, with a view to defeat the mortgage, but *without* offering to prove any knowledge in the plaintiffs of the fraud, if any there was. Defendants then introduced, as witnesses, one Slack and Sawyer, who testified to the admissions of Wetherbee, made before plaintiffs' boy, that "*he knew at the time, it would clear, or kill, the mortgage, but did not suppose Binney did.*" Whereupon the court instructed the jury, if they believed the said Slack or Sawyer, to return a verdict for defendants—which they did in their seats.

Plaintiffs now contend, that the court erred in permitting said mortgage deed to go to the jury, without the production also of the notes, or at least one of them, upon which the mortgage is predicated;—that *parol* evidence was inadmissible to reconcile the variance so apparent upon the face of them, between the notes described in the mortgage and those given in evidence; and, also, that the court erred in their decision as to the *effect* of that evidence, when heard, upon the cause.

It is difficult imagining upon what possible principle of law that testimony was admitted. There is a total variance between the notes admitted and those described in the mortgage, so that with-

out more they would be pronounced inadmissible by every one, upon the ground.

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In the case of *Edgell vs. Stanford*, 3 Vt. Rep. 202, which is a case between mortgagor and mortgagee, it is decided that in case of a variance between the note described in the mortgage and the one given in evidence, *parol proof is inadmissible* at law, to reconcile that variance by showing it to be in reality the same debt intended by the parties to be secured by the mortgage, but written differently by mistake, and that the party's only remedy is in chancery. That case is cited by the court in the case of *Marshall vs. Wood et al*, 5 Vt. Rep. 250, as fully settling the law upon that subject. It is also there decided, that no recovery can be had at law on a mortgage, without the production of the mortgage note on trial, as without its production the law presumes it cancelled and given up, and consequently the debt itself being extinguished, that the lien created upon the land for the security of that debt is gone with it; and that without regard to the title as it stands upon record:—unless, indeed, the absence of the note can be accounted for, as in other cases of loss properly substantiated, consistently with the idea of its being still due, when, perhaps, the rules of law, applicable to lost instruments, might apply. But when, as in the case of *Edgell vs. Stanford*, above cited, the instrument whatever may be its character or effect on the cause, is in existence and in the possession of the party relying upon it;—or, as in the present case, cancelled and given up under a new contract, the case cannot be brought within the principle of *lost instruments*, so as to admit *parol proof of the contents*.

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The same rule is established in chancery.—2 Aik. Rep. 33, *King vs. Harrington et al.*—2 Vt. Rep. 353, *Newell vs. Hurlburt et al.*

But defendants, on the trial below, relied upon the *fraud*, which they say was practiced by Wetherbee upon Binney in the contract by which the mortgaged notes were procured to be cancelled and given up to him in exchange for the new, as taking this case out of the principles above referred to. Suppose it to have been a fraud, and such an one as would vitiate a contract at law in a case where an adequate remedy exists at law. Binney then would have his election, as against Wetherbee, either to affirm or disaffirm the contract. If he affirm it, the old notes are dead, and the new, constituting the consideration paid for cancelling the old, are valid and their payment may be enforced at law. But the new notes do not support the mortgage, on the ground of variance.

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If he disaffirm it and would set up the old contract, treating the new notes as wholly void, and therefore no payment for the old, he is left with his mortgage, but no legal notes in existence to support it; and it presents rather an anomaly in judicial proceedings, that he should be permitted to give those *void notes* in evidence, as a substantive ground of recovery in his favor. I know of no relief which a court of law can give in such a case, but simply to pronounce the contract, sought to be enforced, void, as against the party defrauded thereby, if required. If from the circumstances of the case, merely pronouncing the contract void, does not furnish an adequate remedy to the party aggrieved, there is a power, and but one, which can set the matter right: that is a court of chancery. So that no difference in principle can be perceived, whether the variance is in consequence of *mistake* or *fraud*, as to the proper mode of relief. Both subjects are peculiarly within the province of courts of equity, and seldom can be remedied at law.

But let us carry the principle out a little further, and see the effects in point of practice of sustaining the admission of this evidence at law. There is a recovery in favor of mortgagee. Mortgagor or those holding under him, file a motion to redeem. How can a court of law ascertain the sums due in equity? And when will the time of redemption be out? It is perceptible in this case, that some new consideration in amount must have been included in the new notes. Slack testifies that 70 or 80 bushels of wheat were paid on the old notes while in his custody. By supposing that payment delayed until the very day of exchange of notes, and casting the interest to that time, the new notes contain, at least, nine or ten dollars more than the balance of the old, calling the payment the lowest sum testified to. There is also this difference in amount—the three last mortgage notes were for cash, and the new notes are for as many bushels of wheat (if he raised it) as there were dollars in in the old, (together with the addition above named) when wheat was fetching (as the case shows) from \$1,25 to \$1,50 per bushel. Again, these new notes were all made payable at different times from the old: the last new note falling due in January 1834, and the last of the mortgage notes not until November of the same year. Would the court go by the old notes, as described in the mortgage, or the new notes adduced in evidence? If by the new notes, the record reciting the condition of the mortgage and the order of court thereon, would present rather a *novel* aspect, to say the least of it, with the times and amounts of payments, (with the accruing interest) differing every one of them from any talked about

in the mortgage. If the description in the condition of the mortgage is to govern, deducting the payments proved, what business have the new notes in the case?

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But we deny that there was, *in law*, any fraud in the case. The proof tends to show that Wetherbee *knew* that giving up the notes "would kill the mortgage, but supposed Binney did not." The case, however, finds that Binney was informed by Slack before he had given up the mortgage notes, but after the agreement to make the exchange, "that he had missed it." Still he gives up the notes. Sawyer's testimony also shows, that Binney asked Wetherbee at the time of exchange to give a new mortgage, which Wetherbee offered to do if he would make up to him a small sum mentioned for a previous cheat in a horse trade; but Binney declined doing it. From which circumstance it is by no means certain that Binney did not in fact understand what he was about as well as Wetherbee, notwithstanding Wetherbee *thought* to the contrary. But suppose he did not. Suppose that Wetherbee understood the *law* better than Binney and did not see fit to disclose it to him. Does that constitute in law a *fraud*? Every man is bound and presumed to know the law. The plea of ignorance will not save a man's life—why should it his property?

But suppose again, that instead of the pretended fraud resting wholly upon a *concealment* of the *law*, there had been a direct and false misrepresentation of some matter of *fact*, by reason of which Binney was induced to give up his notes and destroy the mortgage: as, for instance, that Wetherbee had represented that a certain individual named stood ready and would, upon seeing the mortgage notes in his (Wetherbee's) possession cancelled, advance money upon a new mortgage of the same premises, more than sufficient to pay all that was due to Binney, and promised he would, immediately upon the reception of the money, come and take up the new notes; when in point of fact, the story was altogether a fabrication. It is fully settled in the case of *Williams vs. Hicks*, 2 Vt. Rep. 36, that in case the distance was no greater than from Bennington to Burlington, it would not be what the law can declare a fraud—that it is "but the bare assertion of the party,"—"that the other might easily have applied to the individual referred to and ascertained the truth; and if he did not, *it was his own folly* to dispense with that which common prudence required, he should have done."

It is also fully settled that, in a sale, the *concealment* of any ma-

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terial fact under other circumstances is a fraud, yet, if equally within the reach of either party upon due diligence and enquiry, constitutes no fraud. And even that an express warranty does not extend to visible defects. So that, were this to be treated as a matter of *fact*, and not purely of *law*, Binney, upon application to any lawyer in the county, might have been informed of the decision above quoted, "that he could not recover on his mortgage without his notes."

If the innovation upon established principles, here asked for by defendants, shall be sanctioned and adopted by declaring a *superior knowledge* of the *law* in one party and a *concealment* of it from the other, such a *fraud* as to vitiate a contract, where would be the stopping place? Courts must then go on, making innovation upon innovation, until it comes to be decided that any *superior skill* in judging of the value of property contracted for in the one party, and a *concealment* of that skill from the other, is in law a *fraud* and defeats the purchase.

The law permits one who has been defrauded in the purchase of property to rescind the contract *in toto*, and recover back the purchase money in an action for money had and received. And it is the same where the party makes anotherwise voluntary payment of money, under a mistake of the *facts*; yet, the authorities are full, that ignorance or mistake of the *law*, lays no foundation for a recovery.—2 Saun. Plead. and Ev. 215, 216 and 217.—2 East. Rep. 469, *Bilbie vs. Lumley et al.*—Doug. Rep. 468, *Lowry vs. Bourdieu.*—2 John. Rep. 164, *Elting et al vs. Scott and Seaman.*—12 East. Rep. 38, *Stevens vs. Lynch*, (the case from which the doctrine in *Williams vs. Hicks* was taken.)—2 Stark. Ev. 111 and 112.

The remarks and the authorities cited, thus far, are applicable to the question as between mortgagor and mortgagee. But there is a still further objection to the evidence admitted and the decision thereon in this case, growing out of the consideration that the question here arises between the mortgagee and an attaching creditor *without notice* of the fraud, if any fraud there was, as between the original parties. We had supposed the rule settled, as well in equity as at law, that when both parties claim under the same person, (as one by deed, the other by levy,) that neither party's title can be affected by proof of fraud in the judgment debtor, without also showing the party, against whom it is urged, to have been *privy* to that fraud. 4 Vt. Rep. 412, *Edgell vs. Lowell et al.*—14 Mass. Rep. 250, *Bridge vs. Eggleston.*—2 Vt. Rep. 544, *Rubblee vs. Mead.*

Marsh and Williams for defendants.—The defendant Binney, under whom the defendant Morrison holds, shows a mortgage deed of the premises, executed and recorded before the plaintiffs' levy from said Wetherbee to himself, dated November 5, 1829, conditioned for the payment of four notes therein described.

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On the 4th of January 1831, the notes mentioned in the mortgage deed were partially paid and given up, and three other notes given for the balance, amounting to three hundred and thirteen dollars.

The mortgage at the time of the levy and subsequently to the present time remained in full force.

The first question is, whether this exchange of notes operates as a payment of those described in the deed and a defeasance of the mortgage, even though the transaction were a fair and *bona fide* one.

And secondly, whether, as the jury have found, under the charge of the court that the notes described in the mortgage were obtained by Wetherbee surreptitiously and fraudulently from Binney, the transaction still operates as a defeasance of the mortgage security.

It is contended that as the condition of the deed is that it shall be void on the payment of the notes therein described, nothing but actual payment can avoid the deed, and that partial payment and the renewal of the notes for the balance is not payment.

It is true the mortgagee, at any time, when the validity of the mortgage comes in question must either produce the notes described therein or account for their non-production; but if accounted for otherwise than by actual payment the mortgage security is not impaired. But in the case of *Edgell vs. Sanfords*, 3 Vt. Rep. 202, Royce, J. thought, and certainly for very satisfactory reasons, that the burden of showing payment of the note described in the mortgage lay on the mortgagor; and the decision in that case is certainly one of very doubtful authority, and one which it is believed will be overruled when the same question arises. And it is in that case admitted by the court the plaintiff may account for the non-production of the note, by showing that the debt has not been paid, and why producing the note intended by the parties to be secured by the mortgage, though differing a few dollars from the one described was not accounting for not producing the one described in the deed, is not readily perceived.

In *Dunham vs. Dey*, it is decided that "the repeated renewal of the notes which were evidence of the debt is to be regarded as an extension of the credit, from time to time, but ought not to be

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deemed an extinguishment or a satisfaction of the original debt, for which the conveyance was given as security."—15 John. Rep.

555, 567.

In *Davis vs. Maynard*, it is decided that taking a recognizance on the note described in the mortgage and giving up the note, is not a discharge of the mortgage. The court say, not as in *Edgell vs. Stanford* that the mortgage and note are to be considered as one instrument, "the mortgage and note are two distinct securities, and nothing but payment of the debt will discharge the mortgage. This position is grounded on the words or condition of the mortgage, which always are that if the money be paid, then the note or bond as well as the deed shall be void, otherwise both remain in full force. By the terms of the contract nothing but payment is to avoid it."—9 Mass. 242, 247.

In *Shirras et al vs. Craig et al*, Marshall, Ch. J. in delivering the opinion of the court, remarks :

"It is true the real transaction does not appear on the face of the mortgage; the deed purports to secure a debt of £30,000 sterling, to all the mortgagees. It was intended to secure different sums, due at the time to particular mortgagees, advances afterwards to be made, and liabilities to be incurred to an uncertain amount. It is always advisable fairly and plainly to state the truth. But if on investigation the real transaction shall appear to be fair though somewhat variant from that which is described, it would be unjust and unprecedented to deprive the person claiming under the deed of his real, equitable right, unless it be in favor of a person, who has been in fact injured and deceived by the misrepresentation."—7 Cranch, 34, 50.—Peter's Cond. Rep. 407, 410.

But in the case at bar, it was shown at the trial and found by the jury, that the mortgagee obtained the notes described in the mortgage and substituted those which remain unpaid for the balance due surreptitiously and fraudulently, with a view to defeat the mortgage security, taking advantage of the ignorance, simplicity and credulity of Binney, the mortgagee.

It will scarcely be contended that Wetherbee, or those claiming under him, can avail themselves of such an unfair transaction and triumph in his iniquity.

But it is said that the plaintiffs had no notice, or rather there was no proof that they had notice of the fraud of Wetherbee.

They had all the notice that the record of the deed could afford. and this is legal notice. Nothing appeared from the record but that the notes were all due, and that was sufficient to put them on

the inquiry. If they had inquired or did inquire they could scarcely have failed ascertaining the true situation of the business.

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If there was a subsisting title in Binney, as between him and Wetherbee, they could only attach or levy on the equity of redemption.

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If any creditor attach or levy execution on property, when there is of record a title apparently good in any other person than the debtor, he proceeds entirely at his own risk, he cannot be deceived by the record.

If he go on the ground that the conveyance is fraudulent he must afterwards show it to be fraudulent.

If it be a mortgage, and he assumes that the personal security has been paid, he must abide the result of the actual state of things, and the rights of the parties, depending on such state of things.

But the presumption is that they had actual notice of the transaction, as it now appears. If they went to the record that surely furnished them no inducement to attach. There is no pretence that Wetherbee showed them the old notes, and thus induced them to levy. How, then, came they to levy their execution? Why, they had heard that the notes were taken up, and learning, as they must have learned, how they were obtained, (for the thing was not done in a corner) they then stepped in to avail themselves of the fraudulent conduct of Wetherbee, and may properly be regarded as standing in his place.

The opinion of the court was delivered by

ROYCE, J.—It is questionable whether the conduct of Wetherbee was fraudulent in a legal sense, and if it was so, the plaintiffs are not shown to have been privy to the fraud. Consequently, that part of the case which relates to the alledged fraud of Wetherbee is not material, except as it goes to show the consideration of the new notes, that the original debt was not satisfied, and that Binney had no intention to relinquish or affect his lien on the land. The only important question is, upon the effect of exchanging the notes in the manner stated, without a corresponding alteration in the mortgage security.

This mortgage was conditioned for the payment of four promissory notes correctly described in the condition, and those notes were afterwards given up and cancelled, in exchange for other notes which remain unpaid. Should the second set of notes be deemed a payment of the first, so as to satisfy the condition of the deed? As this stipulated, for effect, in the payment of the debt

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evidenced by the first notes, no satisfaction of those notes should be recognized as a performance of the condition, which was not at the same time a payment of that debt. In the case of *Hutchins vs. Alcott*, 4 Vt. Rep. 549, [it was decided, that a promissory note taken for a previous book account, and receipted as in full of the account, was *prima facie* a payment. And a note taken under like circumstances, or with equal evidence of its intended effect, would probably be regarded as payment of any debt by mere simple contract. In the present case there was only a substitution of new notes for those described in the mortgage, without any other evidence of an intent to extinguish the previous debt, than what necessarily arose from the mere act of substitution. That was sufficient to defeat a remedy on the prior notes themselves, because they were cancelled; but it should be available to no other purpose, without further proof of an agreement or understanding on the subject. Hence we conclude, that as between Binney and Wetherbee the condition of the mortgage deed has not been substantially fulfilled.

It is contended, however, that there would be a difficulty in the evidence, and that according to *Edgell vs. Sanford*, 3 Vt. Rep. 202, the new notes could not be received, even as against Wetherbee, to show the original debt still subsisting. They certainly could not, without evidence to connect them with the former notes, evidence of the substitution. The difficulty in the case cited was, that the party never had a note corresponding with the condition of the mortgage deed; it was merely a question of variance. Consistently with that decision the plaintiff might have exhibited a judgment, or some other form of a debt, with evidence showing it founded on the note described in the mortgage; and the second set of notes were equally admissible here, with proof of their substitution for those described in the mortgage. It must be admitted that this doctrine is capable of being pressed too far, and that difficulties may sometimes occur in fixing proper limits to its application; since we may readily imagine such a substitution of new parties, and such an intermixture of new considerations, as would render the application of the principle alike impracticable and unjust. But the present case is attended with no such embarrassments.

Such is our view of the case as between the original parties, and we do not perceive that it admits a different consideration in reference to these plaintiffs. The record of the mortgage deed, without any satisfaction appearing of record, was evidence to other creditors, of Binney's incumbrance. In proceeding against the

mortgaged premises, they would necessarily encounter the risk of being obliged to show some extinguishment of that title. These creditors have failed to show what can be regarded as such, between the mortgagee and their debtor. Having notice of the mortgage, they were bound to make all reasonable inquiry as to any payments or satisfaction of it. And if in the end they should have a fair ground to believe it paid or discharged; in other words, if they should appear to have been misled by what happened between the mortgagee and mortgagor, and thus induced to levy on the land, the mortgage ought not to stand in their way. But the case discloses nothing to warrant such an inference in favor of the plaintiffs. The course they took is rather to be regarded as an experiment to save a doubtful or desperate debt, and not the result of any misapprehension as to facts.

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Judgment of the county court affirmed.

RUTH WILLIAMS vs. ABEL BALDWIN.

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A co-signer of a promissory note, who is but a surety for the other signer, may be constituted by the creditor an agent to collect the note of such other signer. And it is a good defence for the latter, when afterwards sued on the note, that he paid the amount to such co-signer acting as agent of the creditor.

After such agent had died insolvent, and his estate had been settled—*Held*, that his widow was a competent witness in support of this defence.

And it seems that he and his wife might have been called as witnesses for the same purpose during his life-time; as the testimony would only have tended to charge him with a civil liability.

This was assumpsit on a promissory note, executed to the plaintiff by the defendant and one Russell, as joint and several promisors. It was conceded on trial, that the sole consideration of the note was money lent by the plaintiff to the defendant. The defence was, payment by the defendant to Russell, acting as agent of the plaintiff. In support of this defence the defendant read in evidence a receipt, signed by Russell as the plaintiff's agent, for the amount due on the note, and dated April 5, 1830. It appeared that previous to the trial Russell had deceased, that his estate was insolvent, and had been settled. To show the authority of Russell to receive the money as agent of the plaintiff, the defend-

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ant called the widow of Russell, and offered to prove by her, that in March, 1830, said Russell, her then husband, received a letter from the plaintiff, who was his sister, in which she requested him to collect some money for her of the defendant, and send it to her by the first safe opportunity;—that the witness read the letter when it was received, and thus became acquainted with its contents; that it was a family letter, and was carried by her husband in his hat, where she last saw it in the summer of 1830;—that she had since made thorough search among the papers of her said late husband, and the letter could not be found. This evidence was objected to by the plaintiff, on the ground that the witness was incompetent to testify to the facts aforesaid, which transpired during the life of her husband; because no search for the letter had been made among the papers of defendant; and because the facts, when proved, would not constitute an agency in Russell, sufficient to bind the plaintiff. The evidence was admitted, and the jury returned a verdict for defendant. The cause was thereupon removed to this court, on exceptions filed by the plaintiff.

Titus Hutchinson for the plaintiff.—The first question raised on these exceptions is, whether the widow of Russell was properly admitted to testify to her husband's right to receive money of Baldwin on a note, which he, Russell, had signed with Baldwin, so as to bind the plaintiff, without her actually receiving the money.

Perhaps she may be free from interest in this suit, as the estate of her husband proved insolvent, and has been settled, unless through a supposition that this settlement may be disturbed and her dower of assignment affected by a bill in chancery, predicated upon a discovery of a new state of things. This would, at best, be contingent, and something remote.

But we urge, that she ought not now to be admitted to prove a fact to which neither she nor her husband could have been competent to testify while he was living; which is the present case.—In Peak's Ev. 174, marg. p. and 1 Phil. 66, it is laid down that a woman, after a divorce, cannot be admitted to testify against her former husband to any fact which existed before the divorce. In 2 Starkie is the same case, adding the case of dissolution of marriage by death. In 4 Vt. Rep. 131, *Hogaboom vs. Herrick*, it was decided, that referees correctly rejected the widow of the principal as incompetent to prove payment to the plaintiff by her deceased husband in his life-time. Nothing there is stated about the settlement of his estate.

2. The loss of the letter was not sufficiently proved to admit evidence of its contents. If Baldwin ever paid money on the credit of this letter, he would be careful to keep it. No search was made by him.—See 5 Pick. Rep. 436, *Taunton Bank vs. Richardson et al*, the clerk swore to a search for a letter by him and one director held insufficient without the oath of the director also.

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3. We contend that such a letter as the witness describes would be no authority for Baldwin to pay money to Russell on a note signed by Russell with and for Baldwin. No such payment from one signer of the note to the other can destroy the plaintiff's right of action on the note itself. It is merely putting out of one hand into the other.

Washburn, for the defendant, insisted, 1. That Mrs. Russell was a competent witness to prove the facts by her testified to. The estate of Gideon G. Russell, her late husband, had proved to be insolvent, and had been entirely settled, previous to her giving her testimony; and, therefore, the rights of the said Gideon G. Russell, or of his administratrix, or heirs, could not come in question in this or any other suit in relation to the payment of the said money by the said Baldwin to the said Gideon G. Russell.—11 Mass. Rep. 286, *Fitch vs. Hill and another*. 2 Stark. Ev. 709, and the cases there referred to. 1 Strange's Rep. 504.

2. That the letter, as testified to by Mrs. Russell, did expressly authorize Gideon G. Russell to collect the money of said Baldwin; and, therefore, the said Baldwin was fully warranted in paying over the money to the said Gideon G. Russell.

3. That search for the said letter was properly made among the papers of the said Gideon G. Russell, and not among the papers of said Baldwin; for the witness testified, that she saw the said letter in her husband's hat in the summer of 1830, and that he carried it there some time. Therefore, and as the letter was a family letter, there can be no probability that it ever went into the possession of said Baldwin; the letter having been received by said Russell in March, 1830, and the said money paid over by said Baldwin to said Russell the fifth of April, 1830.

The opinion of the court was delivered by

ROYCE, J.—It is contended that proof of the contents of the plaintiff's letter to Russell ought not to have been admitted, without a previous search for the letter amongst the papers of the defendant. But it being described as a family letter, and having

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been seen in Russell's possession long after the payment to him by the defendant, there is no ground to suppose it ever left in the defendant's hands.

And we think it contained a sufficient authority to Russell to receive payment of the note as agent of the plaintiff. It was not a call for payment made by the plaintiff as a creditor, on Russell as a debtor, but was an express authority to obtain the money of the defendant for the plaintiff. There was, indeed, a further request, that the money should be transmitted to the plaintiff; but this direction was not addressed to the defendant, nor should he be holden to see it complied with. The fact that Russell had signed the note with the defendant as a surety is not at all inconsistent with this construction. As between the two it was the sole debt of the defendant, and it was clearly competent for the plaintiff to treat with Russell as an agent or debtor, at her election.

A more important question concerns the competency of the witness by whom the reception of the letter by Russell, and its contents, were proved. At the time to which her testimony referred she was the wife of Russell, a co-signer with the defendant of the note in question. It was very properly conceded by the plaintiff's counsel, that she had no pecuniary interest to be affected; but it was urged that she ought to have been excluded under the rule of evidence which prohibits husband and wife from testifying against each other, and which prevails to a certain extent after the marriage relation has been terminated by divorce, or by the death of one party. This rule is too important to the peace and confidence of married life to be disturbed, but we think it was not applicable in the present instance. The witness was not called to disclose communications made by her late husband, but to state independent and distinct facts; the possession by him of the plaintiff's letter, and the contents of that letter, as ascertained from inspection by the witness herself.

There is another ground on which the witness would seem to be clearly admissible. According to the law of evidence in England, at least since the act of 46 Geo. III. ch. 37, the husband, in his life-time, if not made a party, might have been called and compelled to testify in support of this defence; as his testimony would have only tended to charge himself with a pecuniary demand or civil liability. And the same rule was, in effect, laid down by the present Chief Justice, in deciding the case of *Warner vs. McGahey*, 4 Vt. Rep. 507. That the wife is equally competent under like circumstances has been repeatedly determined. And if this

witness would have been received during the life of her husband, to prove the facts in question, she was certainly admissible afterwards, though her testimony should have tended to charge his estate with this demand. But we have no occasion at present to go this length. The rule of exclusion on which the plaintiff relies is mainly a rule of policy, and has never to my recollection been applied, except in cases to which the husband or wife was a party, or where the estate of either was to be directly affected. But when the question arises collaterally, as in suits between third persons, it then becomes solely a question of interest. And whether Russell had, or had not, such an interest during his life as would have shielded him, and consequently his wife, from disclosing facts which might charge him in another suit, it is obvious that no such interest existed when the widow was called to testify. The estate of Russell was insolvent, and had been settled previous to the trial. There was therefore no subsisting interest of her husband or his estate, which on any ground could operate to exclude the witness. The decision of the county court admitting this witness, and on the effect of the testimony, is affirmed.

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1835.

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WINDSOR,
February,
1855.

WYLLYS LYMAN, Administrator of ELAM BROOKS, vs. ELLERY
ALBEE, Administrator *de bonis non* of HORACE WELLS.

(*In Error.*)

Coverture of the plaintiff should be taken advantage of by plea in abatement, and not by writ of error. Otherwise, if the wife is made defendant without the husband. And if one sues an executrix after her authority as such is determined by marriage, objection should be taken by plea in abatement. After pleading to the action the defendant cannot question her representative character, nor support error for that cause; especially, if before judgment an administrator *de bonis non* is substituted in her stead.

Betsey Wells, as executrix of the said Horace Wells, recovered judgment in the county court against said Lyman as administrator of Brooks, and caused execution to issue against the assets in his hands; and he having failed to satisfy the execution, she afterwards brought her writ of *scire facias*, suggesting a *devastavit*, and claiming to charge him *de bonis propiciis*. Upon the entry of the *scire facias* in court, the said Lyman appeared to the suit and demurred to the declaration, and judgment being rendered against him, he reviewed the cause. At the next term a suggestion being made on the part of the plaintiff, that the said Betsey Wells had intermarried with one Shaw, and that since the last continuance the said Ellery Albee had been appointed in her stead as administrator *de bonis non*, he was admitted by the court as plaintiff to prosecute said action. After final judgment against the defendant below, he brought this writ of error, alleging, as error in fact, that the marriage of said executrix took place before the commencement of the suit by *scire facias*.

Plea in *nullo est erratum*.

Hubbard, for the plaintiff in error, contended, 1. That Betsey Wells, having married before the bringing of the *scire facias*, was wholly incapacitated to commence or maintain said suit.

2. That she could not appoint an attorney, and that his appearance was a nullity.

3. That there was, consequently, no action pending which said Albee could be admitted to prosecute.

E. Hutchinson, for the defendant in error, insisted—That the matter assigned for error was a mere irregularity, which was cured by the appearance and pleadings, as was not assignable for error;—that it was properly pleadable in abatement, and should have been taken advantage of in that way, if at all;—and that the fact that

Betsey Wells was executrix at the commencement of the *scire facias* stood admitted of record by the demurrer, and that nothing can be assigned for error which contradicts the record.

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1835.

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The opinion of the court was delivered by

ROYCE, J.—This writ of error is founded on the 38th section of the general probate act, which says, “that when a feme sole executrix or administratrix shall marry, such marriage shall extinguish her right under such appointment.” And we are inclined to the construction for which the plaintiff in error contends, which is, that the authority is determined at once by force of the statute, without any order or decree of the probate court for that purpose.

The case has been embarrassed in the argument, by blending the common law disability of coverture with the operation of the statute. It is necessary that the proper distinctions should be noticed. Personal disabilities become the subjects of judicial consideration, only in connection with some right or duty, which, by reason of coverture, infancy, or other legal impediment, the party is incapacitated to assert or perform. And here the positions taken by the plaintiff in error are fully assented to; as that a feme covert cannot appear in a suit, nor constitute an attorney to appear for her. And the same is generally true of all other persons subject to legal disabilities. But the mode of taking advantage of a personal disability is varied, as the party subject to it is plaintiff or defendant. If defendant, and the husband or guardian is not joined, a writ of error in right of such defendant is, after judgment, the acknowledged and familiar remedy; but if plaintiff, the disability should be pleaded in abatement, and generally cannot be assigned for error. It is laid down by *Bacon*—“That a man shall never assign for error that which he might have pleaded in abatement; for it shall be accounted his folly to neglect the time for taking that exception.” This is often repeated in other books, and is no doubt the general law. In its application to the disability of coverture this rule has been repeatedly and fully recognized. A case of the kind occurred on the present circuit in the county of Bennington. It follows, that a plaintiff in error, by neglecting to plead in abatement the coverture of Betsey Wells, and demurring to her declaration, must be taken to have waived the objection, and cannot now avail himself of it by writ of error.

But, as already intimated, our statute presents this subject in a view which is disconnected from all considerations of personal disability in its appropriate sense. Those considerations belong to

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the English system of administration, and that of many of the states, where the office of executrix or administratrix is suffered to continue after the marriage ; whereas the marriage operates in this state to extinguish the office. The present is not strictly the case of a personal disability, for that supposes a right and an inability to exercise it. It is a case where one sued as executrix, who, it is now said, did not sustain that character ; and the question is, whether the defendant in that action is still at liberty to bring forward this objection. That the objection might have been taken by plea in abatement admits of no doubt, and the general consequence of omitting that form of defence has been already noticed. If one sues as executor or administrator, and the defendant, instead of contesting the representative character of the plaintiff, pleads to the action, he is held thereby to admit the plaintiff's character, which cannot afterwards be called in question. This position, so far as it relates to mere personal actions, is supported by numerous authorities, and none are recollected to the contrary. Betsey Wells might therefore have proceeded to judgment in the suit, had there been no substitution of Albee in her stead. After the plea to the action, her capacity as administratrix could no longer be questioned, either in the progress of that cause, or afterwards by writ of error. Such, at least, was the undoubted state of the case at law, and there is no occasion to inquire, whether, in case of real danger to the defendant, relief might be obtained in equity. And her representative character being thus confessed, for all the further direct purposes of the suit, we are satisfied that it should be considered as equally settled, for the incidental purpose of substituting the administrator *de bonis non* in her place.

Judgment of the county court affirmed.

REUBEN GATES vs. WILLIAM LEWIS.

RUTLAND,
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1832.

Where the boundaries mentioned in a deed of conveyance are inconsistent with each other, those are to be retained which best subserve the prevailing intention manifested on the face of the deed.

Trespass quare clausum fregit. The trespass was alleged to have been committed on Right No. 64 in Sherburne, between the 15th day of July, A. D. 1830, and the commencement of the suit. The defendant pleaded *not guilty*, accompanied with notice, that he should justify the trespass, by showing title in himself, and also by showing title in Jesse Williams and Josiah Wood, and that he entered, and did the acts complained of, as their servant. On trial the plaintiff read in evidence a deed from said Williams and Wood to Pliny Church, dated January 10, A. 1822, and from Church to the plaintiff, dated October 2, A. D. 1824. The description of the land conveyed in both these deeds was the same, and as follows:—"a certain piece of land in Sherburne aforesaid, lying and being on the north-east part of the right, or proprietor's share, drawn or allotted to the name of *Jonathan Heath, Jr.*, bounded as follows, to wit: beginning at a birch tree the north-east corner of said right, thence south, twenty-eight west, on the east line of Sherburne, one hundred and fourteen rods to a stake and stones; thence north, sixty-two degrees west, parallel with the lines of said right, about two hundred and eighty rods, near to the top of the east hill, so called; thence northerly along or near the top of said east hill, in such a direction to the north line of the said right drawn to *Jonathan Heath, Jr.*, which right being numbered sixty-four in the plan of said town of Sherburne, as will include two hundred acres; thence easterly on the north line of said right 64 to the place of beginning." It appeared in evidence that the north line of said right intersected the east line of the town, about six and one fourth rods north of the birch tree aforesaid. It further appeared that there was an old line running westerly from said birch tree, which did not correspond with any lot lines, but diverged to the south thirty rods, or more, in crossing the lot; and it did not appear to have been ever regarded as a lot line. The plaintiff shewed, that in A. D. 1825, he took possession under the deeds aforesaid, and made improvements extending to the north line of said right. The original title of Wood and Williams was admitted.

The defendant offered in evidence a deed from said Williams and Wood to himself, dated July 15, A. D. 1830, of about five

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acres of land, described in the deed as follows:—"Lying and being in Sherburne, in the county of Rutland, and state of Vermont, on the north-east part of Right No. 64, as numbered on the plan of the town of Sherburne. Beginning at a birch tree standing on the east line of said right, being the north-east corner of the lot conveyed by said Williams and Wood to Pliny Church; thence north, sixty-one degrees west, two hundred and sixty-seven rods to a stake and stones, standing on the north line of said right; thence south, sixty-two degrees east, on the line of said right, two hundred and sixty-seven rods to a stake and stone; thence south, twenty-eight degrees west, six and one-fourth rods to the birch tree, being the first mentioned bounds." This deed was objected to, as containing part of the same land before conveyed by the grantors to Church, and for that reason was excluded by the court. The trespass proved was committed after the execution of said deed to the defendant, and within the boundaries contained in that deed. The defendant brought up the case, on exceptions stating the afore-said facts.

R. C. Royce and Hodges for the defendant.

Aikens for the plaintiff.

The opinion of the court was delivered by

ROYCE, J.—When Williams and Wood executed the deed to the defendant, the plaintiff appears to have been in possession of the land attempted to be conveyed by it, as part of his own purchase. And by reason of such possession alone, that deed was probably rendered invalid, under the statute of A. D. 1807. But in such case, the defendant might still have proceeded on his second ground of justification, by showing that he entered upon the plaintiff by licence and command of Williams and Wood, though their deed to him might not be competent evidence for that purpose. The ground on which the deed was rejected must necessarily have led to the exclusion of any evidence, however proper in its character, under this branch of the defence. Therefore, we are not to assume that no such evidence existed, or to refuse a new trial because it was not offered. At present, the cause must turn on the question, whether Williams and Wood had parted with their title, before they deeded to the defendant; in other words, whether the *locus in quo* was included in their previous deed to Church. A part of the description in that deed must, of course, be rejected, since the whole cannot stand. To give the deed the operation for

which the plaintiff contends, we must reject the birch tree as the place of beginning, and the plaintiff's east line will run but one hundred and eight rods south of that tree, instead of one hundred and fourteen. All the other boundaries are preserved. On the defendant's construction, we must reject the north-east corner of the right as the place of beginning, and the north line of the right as the closing line in the description; and another line must be substituted, which is not given in the deed. In determining what part of this repugnant description shall be rejected, we must follow the prevailing intention of the grantors, as manifested on the face of the deed. They profess to convey two hundred acres in the north part of the lot. This language implies, (though not conclusively,) that no part of the lot was situated still further north and east than the tract granted. They expressly make the north and south lines parallel; and this becomes impossible, if we take a diagonal line running westward from the birch tree. The west line is extended by the deed to the north line of the right, and the latter is made the northern boundary. And the north-east corner of the right, as well as the birch tree, is made the place of beginning. From all this we are satisfied, that the north-east corner of the right was intended to be the controlling *terminus* in the description. The result is, that Williams and Wood had no interest in the land, by which their deed or licence to the defendant could be sustained.

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Judgment of the county court affirmed.

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JOHN S. PETTIBONE vs. WILLIAM PURDY.

A highway which was established before the passing of the act of Nov. 7, 1800, cannot, when subsequently discontinued, be legally set over under the second section of that statute, except to the person on whose land it is situated.

This was ejectment for land in Manchester. The case was before this court at the last term, when the judgment of the court, awarding a new trial, was pronounced by the late Justice Thompson. Hutchinson Chief Justice at that time expressed a dissenting opinion. The evidence at each trial below was the same, with this difference, that the matters shown in defence on the first trial were offered and rejected on the last. Judgment having passed for the plaintiff in the county court, the case was again brought up on the following bill of exceptions :

On the trial aforesaid the plaintiff to support said issue on his part, gave evidence tending to show, that one Samuel Pettibone, the father of the plaintiff, went into possession of a lot of land, of which the demanded premises are a part, about the year 1779; and continued thereof possessed, excepting a part of said lot east of the demanded premises, till the time of his death in the year 1822. And that the plaintiff, as his *devisee*, at the time of the death of said Samuel entered into the possession of said lot, and continued thereof possessed, excepting the said part thereof east of said demanded premises, up to and at the time of the commencement of this action.

Evidence was also given tending to show, that the said demanded premises were part of the highway, leading through said lot of land, which *highway* had been duly surveyed and laid out by a committee appointed by the county court for that purpose, in the year 1799, on the cite of the highway, as the same had been used and travelled many years prior to 1799.

Evidence was also given tending to show, that the said Samuel Pettibone, in the year 1786, conveyed the part of said lot of land east of said highway to one Amos Chipman, bounding him, on the west, by the east line of said highway.

Evidence was also given tending to show, that at the time of the commencement of the plaintiff's action, the defendant was in possession of the demanded premises, having embraced the same within his enclosure.

The defendant to support the said issue on his part offered to show and give in evidence, that prior to the year 1825, he had purchased, and entered possession of, the part of said lot conveyed by said Samuel to said Amos as aforesaid, and bounded on the

west by the east line of said highway as aforesaid, under the aforesaid title of said Amos, and was the owner and possessor thereof up to and upon the 17th day June 1825, and ever since. And further offered to show and give in evidence, that a new road or highway, running through the said land of the defendant, being a part of said lot, and eastwardly of, and nearly parallel with, the aforesaid road, was surveyed, laid out and established; and thereupon the said highway and road which passed over the said demanded premises was discontinued, and the said old road, or discontinued highway, set over to the defendant, by a committee appointed by the county court of Bennington, June term, 1835:—reference being had to the records and proceedings of said court and committee therein, which are part of the case.

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To which evidence, so offered by the defendant, the plaintiff objected, and the court rejected the same. To which decision the defendant excepts, and prays the same to be allowed, and pass to the supreme court for adjudication.

Mr. Sargeant for defendant.—The title set up by the defendant to the land is derived from the same having been set over to him, in part compensation for damages, sustained by means of a road having been laid through his land, by a committee duly appointed by Bennington county court, in pursuance of the second section of the act of 1800.—Rev. Stat. 435.

The rejection of the record on the trial below necessarily sets that statute at defiance; and we now present the question of the validity of that statute, under no small degree of embarrassment, from the fact that at the last term of this court, on a hasty hearing, the same was, by a majority of the court, pronounced unconstitutional.

Nothing short of a deliberate conviction of the correctness of the principle for which we contend, would have prompted the defendant's counsel to urge upon the court a reconsideration of the case.

The subject of roads must necessarily be at all times under the control of the government; and *that control* cannot with safety be curtailed. Every citizen of the republic must in this, as in other things, surrender some portion of his private interests, where the good of the whole require it.

The framers of our constitution wisely foresaw this necessity, and have provided that private property may be made subservient to public use, and no government can be strong or durable without such power; whilst every attempt, in one branch of government,

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to weaken or lessen the powers of the other, inevitably paralises the strength of the whole.

If the principle can be maintained, that the legislature has the power assumed in the passage of the statute in question, there was one defence complete in the action.

Without calling in question the common law doctrine, that the soil of the highway belongs to the adjoining owner, (subject to the public easement,) we claim for the legislature the right to appropriate the use of a discontinued road, to compensate for the use of other lands, which the government may see fit to take for public use. And this is all the statute of 1800 amounts to. And thus far it has its full operation, without violence to the common law rights of the adjoining owner.

But how is this power of the legislature regarded in other governments, where the rights of citizens are shielded with a jealousy equal to ours?

By the statute of 13 Geo. III. sec. 13, 14,—3 Bac. Abr. 59, powers are given, even to sell the soil of a discontinued highway, giving the adjoining owner the first right of purchase, and reserving to him mines and minerals only.

So in the statutes of New York and Massachusetts, in their charters for *canals, turnpikes, and railroads*, they have after providing for the payment of appraised damages, declared the corporations seized and possessed of the soil in fee simple.

We have yet to learn that the constitutionality of these statutes have ever been doubted, either in England, or our sister states.

It is difficult to imagine a distinction between the taking real estate for governmental use, and the taking personal property for like purpose. And it cannot be pretended that in case of personal chattels, the government obtains only the right to a temporary use of it. The constitution means no such thing.

By the doctrine of the common law, the lord of the manor, or adjoining owner, has the exclusive right of depasturing the highway through his premises; yet no jurist will question the constitutionality of our several statutes, restraining certain animals from running at large in the highway, although it should restrain vested rights.

The statute now in question was in full operation nearly *thirty* years. Selectmen in the several towns constantly practiced under it; our courts uniformly accepted and ratified the doings of their committees, in setting over roads under it; and consequently large amounts in valuable real estate are holden under such titles, in every town in the state. The legislature has uniformly sanctioned not

only its constitutionality, but its expediency, by suffering it to remain unrepealed, It has also escaped the searching operation of no less than four councils of censors. In short, it has received the sanction of every branch of government.

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So far as the present case is concerned, the plaintiff has no equitable claim upon the land. His ancestor must be presumed to have received its full value, when it was taken from him by the government. And certainly, the government had the right to keep it until the end of time. It matters not, then, to the plaintiff, what use the plaintiff makes of it.

To upset the defendant's title now, would be taking from him that for which he has been compelled to pay (not voluntarily,) a full consideration, and give it to one who has no conscientious claim to it, and answer no other purpose, but to preserve an arbitrary *dictum* of the common law, which is at war with all our civil institutions.

Bennett and Aiken contra.—The common law relating to public highways may be reduced to a few simple propositions.—

1. Highways may be created by proceedings under the writ *ad quod damnum*, by dedication of the land by the owner, or by user, from which such dedication may be inferred. They may also be created in pursuance of acts of the legislature. 2 Stark. Ev. 661 to 667.—2 Vt. Rep. 48.

2. By their creation the public gains no interest in the lands over which they pass, but only a servitude or easement, viz. the right of making, repairing, and keeping in repair the road, and freely passing thereon.—3 Com. Dig. 30.—Chem. A, 2.—2 Strange, 1004.—Strange, 1238.—6 East. 154.—11 East. 51.—1 Burrow. 133.

3. The fee remains all the time in the original proprietor, or his assigns, who are entitled to the full use and profits thereof, to all above and under ground, saving only the easement, and who may maintain actions for violation of their rights.—1 N. H. Rep. 16.—2 Mass. Rep. 127.—4 Mass. Rep. 427.—6 Mass. Rep. 454.—1 Con. Rep. 103.—2 John. Rep. 357, 424.

4. Consequently, when a highway is discontinued, no new interest passes to the lord of the soil, but his land is merely freed from the servitude.—7 John. 106.—15 John. 447.—2 Vt. Rep. 378, *Ferre vs. Doty*.

As to the question, who is lord of the soil? the rule is this: the owner of the land on both sides of the highway is taken *prima facie*

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cie to be owner of the fee of the road. And if different proprietors own on the different sides of the road, each is taken *prima facie* to own the centre. These, however, are but presumptions, which may be rebutted, by showing the fee to be in one alone, or neither of the adjacent proprietors.—Com. Dig.—Chem. A, 2.—11 East. 51.—Lofft. 358.—15 John. Rep. 447.

On these principles the premises in question are most clearly vested in the plaintiff.

But the defendant claims, and offers evidence to show, that the premises have become his, by virtue of a setting over, in pursuance of the act of 1800.

The land in question, as appears by the case, had been dedicated by the proprietor, Samuel Pettibone, to the use of the public for a highway, and had been used as such long prior to the passing of the act of 1800.

1. But suppose this road had been laid out since 1800, we should insist, still, that the defendant has not got the land by this setting over.

If any right is to pass by setting over under this act, it must be the fee. Nothing remains for the public; nothing for the former proprietor. The entire estate must therefore pass, if any thing. But at what time did the public acquire this entire estate? Not at the time when it ceased to want the use. It must be, then, at the time of the laying out of the road.

The *fee* in highways would be useless to the public, while to the citizen such a doctrine would be extremely vexatious and injurious.

Besides, we contend that such a doctrine would be inconsistent, as well with the spirit as the letter of the constitution. *Public necessity* is the only ground on which private property can be taken at all for public uses. An easement is all that public necessity requires. And the public can no more be justified in taking a greater interest in property than is needful, than by taking no greater quantity than is needful.—Declaration of Rights, Art. 102.

2. But it is unnecessary to rest the question on this broad ground. The road in question existed long before the passage of the act of 1800. The plaintiff, or those under whom he claims, then held their rights to the premises as at common law. *Were invested with the fee, the right of enjoyment and occupancy not inconsistent with the easement, and the right of full, entire, and absolute occupancy, as soon as the easement should be removed.*

The defendant claims that *by virtue of this act*, these rights,

then vested in the plaintiff, might be divested and taken away, and given to *him*; and that without recompense, and without the consent of the proprietor. This doctrine we resist entirely.

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It is now to be regarded as settled constitutional law, that the legislature cannot divest rights of property acquired under previously existing laws, and transfer them without the assent of the parties. The opposite doctrine has been constantly resisted by every judicial tribunal in this country, as inconsistent with all just principles of government.—2 Dallas, 304.—3 Dallas, 383.—2 D. Chip. Rep. 88.—1 Aik. Rep. 121.—1 Aik. Rep. 314.—2 Aik. Rep. 293.—2 Vt. Rep. 518.—2 Peters' Rep. 656, *Wilkinson vs. Leland*.

It is no answer to these cases to say, that most of them have arisen on *private* acts, whereas this is a *public act*. To give a retrospective effect to a general act is merely multiplying the evil. Even in England this act would be construed prospective only?—2 Mod. 310.—4 Burrow. 2460. Much more should it be so construed here; where, by the theory of government, the supreme power is with the people, and the power to pass retrospective laws is no where delegated.—10 Mass. Rep. 439.—7 John. Rep. 477. 15 John. 447.—*Hill et al vs. Sunderland*, February term, 1831, in this county.

It cannot be contended that the doctrines of the common law are "inapplicable to our local situation and circumstances, or repugnant to the constitution of this state." They have been uniformly recognized as law by our courts.

3. In the third place, we resist the act in question, because it authorizes recompense to be made otherwise than in *money*, which is required by the constitution.—2 Mass. Rep. 125.—2 Dallas. 304.—Declaration of Rights, Art. 2.

The public cannot be said, with any propriety, to be a purchaser of the land over which a road passes. It is "the damage done to the landowner by laying the road" that entitles to compensation, and fixes the amount.—Comp. Laws, 427, 423. This may be equal to the value of the land, may be more or may be less.—5 Mass. Rep. 435.—9 Mass. Rep. 388.

The opinion of the court was delivered by

ROYCE, J.—In the argument of this case it has not been directly contended, that by legislative enactment the estate of one citizen can be taken, without compensation, and bestowed upon another. It would be no less vain to attempt the support of such a principle,

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than it is needless, at this day, to expose its repugnance to the genius of our constitution and government, and to all consistent ideas of civil liberty or the law of property. Neither can it be admitted that property may be so taken for public use. It is only upon an equivalent, previously paid, or secured by pledge of the public faith express or implied, that private property can be made subservient even to the exigencies of government. The effect to be given to the statute under consideration must therefore depend on the extent of those rights which are left to the proprietor, when a highway is laid and established through his land. And the rules of law on this subject, considered apart from the statute in question, are too firmly settled to admit of controversy. By the establishment of an ordinary highway, the public acquires but an easement in the land; the right of making, repairing, and using the highway, as an open passage or thoroughfare. Subject to this right the owner of the soil retains, and may exercise all his rights of property therein. He may take from it stone, timber, and the like, which are not wanted for the support of the highway. And he may vindicate his qualified right of possession by action of trespass or ejectment, against those who attempt to appropriate the land to any other than this public purpose. From these principles it regularly follows, that when the highway is discontinued, the land becomes discharged of this servitude, and the owner is restored to his former and absolute right. We are not apprised of any statutory provisions, previous to this act, by which these rules of general law are varied or controlled. No statute had directed payment to be made for the land itself, on which a highway was laid, but only for damages occasioned by the existence of the highway, while it should be continued. And in many cases even damages were not assessed; and where it was considered by the proper board that none were actually sustained, and where the land was unimproved.

The original title of the plaintiff covered the land in dispute, whilst the conveyances under which the defendant held included no part of it, being expressly limited to the east line of the highway. Consequently, the plaintiff showed a clear right to recover, unless his title was divested, and transferred to the defendant, by the doing of the road committee in June 1825.

Those proceedings were had under the second section of the act of Nov. 7, 1800. That section in terms extends to two cases; one, where the old and new road run through the lands of the same person; the other, where the old road adjoins the person's land, through which the new road is laid. In the first case the

statute may be executed without objection; as the select men or committee have only to estimate the comparative injury, of having a highway established in one portion of the party's land, instead of another. The act of setting over the old road would be available, as evidence that such road was discontinued. The same may be said with reference to one half of the old road, where it is owned in moities by adjoining proprietors. But here the old highway adjoined the defendant's lands, and no part of it was originally his. It now becomes material to notice the fact, that the highway in question was established before the passage of this statute. The case states it to have been surveyed and laid out in 1799, on the site of a previous highway, which existed when the plaintiff's ancestor conveyed to Chipman in 1786. And it is also to be remarked, that the first provision for setting over old roads was contained in this act of 1800. These previous highways must therefore have been established without reference to any such provision. If damages were assessed, they could not have been regulated by the contingency, that the land itself, at some after period, might be conveyed in this manner to another person. According to the principles already advanced, the plaintiff had, therefore, a permanent title and beneficial interest in the land, when it was set over to the defendant. It is not pretended that the statute contemplates a compensation to be made in these cases, or that any was in fact made in this instance. Here, then, was an attempt to transfer this estate of the plaintiff, against his will and without an equivalent. And should this be sanctioned, the operation of the statute might be stated thus:—Had this highway been situated elsewhere on the plaintiff's land, he would have had the incumbrance of the road removed for nothing; whereas he now loses the land which was covered by it. To obviate this conclusion, the statute has been represented, as having merely provided a mode of continuing the public right in the land. And this, it is insisted, may be done by transferring it to an individual. But the right of the public was only a right of way or passage; and it is absurd that this should be the subject of transfer to the defendant, leaving a permanent right of property in the plaintiff. We are brought to the result, that in this case the attempted transfer by the committee was imperative. That to give it effect would be to disturb a fundamental principle of private right, which is recognized and secured by the constitution. The operation of the statute, upon highways created since its passage, is left to be settled, when a proper case shall require it.

Judgment of the county court affirmed.

BENNINGTON,
February,
1832.

Petibone
vs.
Purdy.

CASES IN THE SUPREME COURT

CHITTENDEN,
December,
1834.

WILLIAM WOOD vs. BEACH and FARNSWORTH.

Some consideration is necessary to make a deed of land valid.

Parol proof is admissible to show a consideration where none is expressed in the deed, or the sum is left blank.

This was an action of ejectment. Plea, *not guilty*. On the trial the plaintiff proved that Samuel Calhoun, Jr. was the owner of the premises in question on the 28th day of February, A. D. 1832. The plaintiff then gave in evidence two writs of attachment, judgments, executions, with the officer's return thereon, levying and extending the same on the premises in question in the plaintiff's favor against said Samuel Calhoun, Jr., which were admitted without objection.

The defendants then offered in evidence a deed from Samuel Calhoun, Jr. to said Beach and Farnsworth, conveying the premises in question, dated the 28th day of February, A. D. 1832, which was objected to by the plaintiff on the ground that it did not appear on the face of said deed that it was executed upon any good and sufficient consideration. The defendants then offered to prove by parol that a sufficient consideration was paid by said grantees for the execution of said deed. To the admission of this evidence the plaintiff objected, but the objection was overruled by the court and the testimony admitted. The defendants proved by parol that the deed was executed by said Calhoun in consideration of the payment by the grantees of a note signed Samuel Calhoun, payable to the Bank of Burlington, for nine hundred dollars. On this testimony the court decided that said deed was valid, and ordered a verdict for the defendants;—to which opinion and decision the plaintiff excepted, and the cause passed to the supreme court for revision.

The deed, as to the consideration, was as follows:

"Know all men by these presents, that I, Samuel Calhoun, Jr. of Westford, county of Chittenden and state of Vermont, for and in consideration of the sum of dollars, current money of the United States, received in full to my satisfaction, of Thompson Beach and Josiah Farnsworth, the receipt whereof I do hereby acknowledge, have given, granted, bargained, and sold, and by these presents do give, grant, bargain, sell, alien, release, convey and confirm unto the said Thompson Beach and Josiah Farnsworth, their heirs and assigns forever," the lands in question.

Smalley and Hunt for the plaintiff.—A deed of bargain and sale at common law, if made on sufficient consideration, conveys the use of the land to the grantee. But the land itself remains in

the grantor. But as courts of law took no notice of uses, or trusts, it was necessary to apply to a court of equity to compel an execution of the use.

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Courts of equity always refused to compel an execution of the use, unless the deed was made upon a valuable consideration. Upon the principle established by the courts of equity, a valuable consideration was necessary to raise the use.

The statute of 27th Henry VIII. merely transfers the possession to the use; but created no new uses, or new modes of raising a use.

Hence both at common law and under the statute of 27 Henry VIII., called the statute of uses, a deed of bargain and sale without consideration left both the land and the use in the grantor.

Even in a deed of feoffment, accompanied with livery of seizin, the feoffee was in equity deemed seized to the use of the feoffor, unless he proved that he had paid a valuable consideration, or the uses were declared by the deed.

This deed, then, upon the face of it, professing to have been made without consideration, conveyed nothing to the grantee under common law, or under the statute of uses.

The inquiry then is, whether our statute gives any effect to this deed, which it did not possess at common law.

The 5th section of the act of 1797 directs that all deeds and other conveyances of any land, &c. signed and sealed by the party granting, and witnessed by two witnesses, and acknowledged and recorded, shall be valid to pass the same without any other act or ceremony in law whatever.

This act makes recording tantamount to livery of seizin, but does not in any other respect give a different effect to the deed than that which it had at common law.

If then a deed of bargain and sale, without consideration, at common law conveyed no interest to the grantee, it can convey none under our statute.

If this deed both at common law and under our statute is upon the face of it inoperative, for the want of consideration, can a sufficient consideration be proved by parol, to support and give effect to the deed?

To the admission of this evidence it is objected—

1. That parol evidence ought not to be admitted to supply the defect of the deed, for this species of evidence can never be adduced to vary or contradict a valid instrument, or to give effect and validity to one that is defective.

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The cases on the admissibility of parol evidence with respect to the consideration of a deed may be arranged in three classes.

(1) When the party is permitted to aver another consideration consistent with that which is expressed, as in *Mildmay's* case, Cok. Abr. 12, where the deed was expressed to be made for divers good causes and considerations, it was resolved that the bargainee might aver the payment of money or other valuable consideration.

(2) Where a specific consideration is expressed in the deed, it is well settled that no averment can be admitted of any other or different consideration, for that would be to contradict the deed.

(3) Where no consideration is expressed in the deed, or rather where the deed contains no reference to a consideration, it has been held that as between the grantor and grantee, proof of a valuable consideration may be admitted. For as the deed makes no mention of a consideration, it is said that an averment that it was made upon a valuable consideration stands with the deed. But here the deed expresses the negative of a consideration, and if it has any operation it must be as a gift. To admit parol evidence of a consideration, would therefore be in direct violation of both branches of the rule, that it cannot be admitted to contradict or add to the terms of a written instrument.

2. It enables the parties to convey a fee simple by parol.

The section of the act of 1797 was evidently designed to prevent the creation of any estate in land beyond that of a tenant at will by parol. But if the grantee can be permitted to add to this deed after it is executed, delivered, acknowledged and recorded, by parol, the main fact which is necessary to make it a valid deed, this section of the act has been virtually repealed.

In this case it seems to be admitted that the deed without parol proof is inoperative and conveys no title as against the plaintiff. What then conveys the title to the land? Not the deed, for that is admitted to be insufficient for that purpose; but the parol proof, which the grantee may introduce. The adoption of such a principle would entirely destroy all benefit resulting from our system of recording. It enables the grantor and grantee to put upon the record a deed which is valid or invalid, as they should furnish or not furnish proof of a consideration; and this puts them in a position to make the deed effectual or not, as subsequent circumstances may require.

One cardinal maxim in this state is, that all titles to real property, which are to affect creditors, shall appear of record.

This deed, as executed and recorded, conveyed no title to the

grantee as against an attaching creditor. Shall the creditor now be sent out of court after having incurred great expense upon the ground of this deed's being inoperative, by the parol proof of the grantee, which he has kept till this time in his pocket?

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No case can be found in this state in which parol evidence has been admitted to add or give effect to any title to real estate, which upon the record was defective, as against an attaching creditor.

Executions levied upon real estate are not permitted to be aided by parol evidence.

Whittemore for defendants.—1. The deed in question expresses a sufficient consideration—"for and in consideration of the sum of dollars, current money of the United States, received in full to my satisfaction"—is a recital of a good pecuniary consideration to raise a use in the defendants. In consideration of a sum of dollars is at least equivalent to two dollars, and may mean more. It is also recited to be current money of the United States. But suppose the word dollars should be stricken out, as it may be if necessary to support the deed, it would then read for a certain sum of current money of the United States, and such a consideration has always been held to be good. In 2 John. Rep. 230, *Jackson vs. Schoonmaker*, a deed of land was held to be good, the consideration whereof was recited to be for "a certain sum of money." In *Jackson vs. Alexander*, 3 John. Rep. 491, the words, "for value received," were held to be a sufficient consideration arising upon the face of the deed to conclude the grantor and give efficacy to a deed of bargain and sale. So in Shepard's *Toughstone*, p. 510, it is said, if a man by deed, in consideration of a "competent sum of money, to him paid, or otherwise promised to be paid, bargain and sell a fee simple, the use will arise to the bargainee well enough."

In Kent's *Commentaries*, vol. iv. p. 465, he says, "if any sum is mentioned, the smallest in amount or value will be sufficient to raise the use." It is therefore submitted with confidence, that this deed contains on the face of it a sufficient consideration to raise a use to the bargainee.

2. If it be urged that the smallness of the consideration will raise a presumption that the deed was either voluntary or fraudulent, it is answered, that as the sum expressed is indefinite, the defendants are at liberty to rebut that presumption by proving the true consideration paid.

In *Mildmay's* case, 12 p. Cok. Abr. Rep. vol. i. (p. 175 original

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Reports,) it is said—"A use cannot be raised by any covenant, promise or bargain, &c. upon a general consideration; and therefore, if a man by deed indented and enrolled, &c. for divers *good causes and considerations*, bargain and sell his land to another and his heirs, *nihil operatur inde*, no use shall be raised upon such general considerations, for it doth not appear to the court that the bargainor hath *quid pro quo*. But the bargainee may aver that money or some other valuable consideration was paid or given, if in truth it was so, and the bargain and sale are good."—Shepard's Touchstone, 510, 222. 4 Kent's Com. 465.

In 7 Pick. Rep. 533-7, Parker, Ch. J. says, as smallness of consideration may be relied on as evidence of fraud, the party claiming under the deed may show that another or greater consideration is given than is expressed in it.

3. If it should be decided that the deed does not contain any expressed consideration sufficient to raise a use in the defendants, we still contend that it was competent to prove an actual *bona fide* consideration paid.

It is in the first place observable, that neither Littleton or any of his commentators, nor Blackstone, nor the author of the Touchstone, in their enumerations of the requisites indispensable upon the face of a deed of lands of any description, state that a deed is inoperative unless the consideration is expressed in it. All deeds of gift or feoffment are good without any consideration in fact. It is only required as the foundation of a deed of bargain and sale.—2 Bl. Com. 297, and notes. Shep. Touch. 221. Accordingly, it has often been decided, both in England and America, that when a deed of bargain and sale contains no consideration expressed upon the face of it, the party claiming under such deed is at liberty to aver and prove a sufficient consideration.—Shep. Touch. 222, 510. *Peacock vs. Monk*, 1 Vesey, 128. 3 Stark. Ev. 1004. *Davenport vs. Mason*, 15 Mass. Rep. 449. *Wilkinson vs. Scott*, 17 Mass. Rep. 249. 8 Conn. Rep. 318. 7 Pick. 533-7, 539. *Atherly on Marriage Settlement*, 162-4. *Jackson vs. Fisk*, 10 John. Rep. 456. 4 Kent's Com. 465. Cok. Abr. Rep. 12.

4. Should it be objected, that purchasers and creditors are likely to be affected by the appearance of the records, the answer is, that they are bound to know the law, and must attach or purchase at the peril of the bargainee being able to prove a sufficient consideration.

5. This question has already been decided in this court.—3 Vt. Rep. 448.

6. The ordinary recital of a consideration, and the usual receipt which follows, is no evidence that the consideration has been paid. Matthews' Presump. Ev. 394.

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The opinion of the court was delivered by

MATTOCKS, J.—The questions which arise in this case are—

1. Whether the deed from Samuel Calhoun, Jr. to Beach and Farnsworth was invalid for want of a consideration expressed therein; and

2. Whether parol proof was properly admitted to prove that the deed was in fact given for a valuable consideration.

That part of the deed in question is as follows:—"For and in consideration of dollars, current money of the United States, received to my full satisfaction of," &c. If the proper reading of this passage is—in consideration of dollars, current money, &c. then it would mean two or more dollars, which would suffice, as any sum of money would be sufficient. But if it is to read—in consideration of "*blank*" dollars, current money, &c., as it is common to read an open space left between two words in printed forms, the filling up of which is necessary to make sense of an instrument, then it is no dollars, and of course no consideration is expressed. The syntax of the law is somewhat different from that of general literature. The latter, in ascertaining the meaning of a sentence or paragraph, is governed somewhat by the other rules of grammar also. But the law, in putting its construction upon language, is privileged to apply or reject these other rules, as shall suit the wisdom of its purpose; and upon an emergency, it may even treat any given passage as a *synecdoche*. Yet it will husband this prerogative, and not waste it upon a case that may be determined upon principles that are more ordinary and more safe.

But we leave this point *in dubio*, and decide the case upon the second.

In *Mildmay's* case, Cok. Abr. Rep. 12, it is said—"a use cannot be raised by any covenant, proviso or bargain, upon a general consideration; and therefore, if a man by deed, indented and enrolled, &c. for divers good causes and considerations, bargain and sell his land to another and his heirs, *nihil operatur inde*, no use shall be raised upon such general considerations, for it doth not appear to the court that the bargainor had *quid pro quo*; but the bargainee may aver that money or other valuable consideration was paid or given, if in truth it was so, and the bargain and sale is good." It is observable that this was the case of a use, the doc-

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trine of which was, that the land itself did not pass for want of livery and seizin ; and if there was no valuable consideration given, then the grantor stood seized to his own use ; but if there was, then the grantor stood seized to the use of the grantee ; and as deeds of bargain and sale grew out of the law of uses, the law requiring a consideration to make the latter valid has descended with it, probably without much reason here, where no livery of seizin is required, as it is not very apparent why a consideration which is dispensed with in other sealed instruments should as between the parties be still required in this ; yet this seems to be the law. The only objection that has been made against this ancient authority is, that these general considerations were recited in the deed, and then a particular one was permitted to be averred ; whereas, here no consideration is named in the deed, and still a particular consideration was allowed to be proved. But in the case cited, as no use was raised by those general considerations, the deed did not make even a *prima facie* case for the grantee, and the averment and proof of the real consideration became necessary to give effect to the deed and create the use ; which seems much like this case of giving parol proof to support and give effect to the conveyance ; and several of the other authorities cited by defendants' counsel are explicit upon this point. Shepard, in his Touchstone, vol i. p. 510, says—"for howsoever an averment in this case shall not be allowed and taken against a deed, that there was no consideration given where there was an express consideration upon the deed. Yet when the deed expresses no consideration, (or saith for divers good considerations or the like,) then an averment of a good consideration given shall be received, for this is an averment that may stand with the deed." In 4 Kent's Com. 465, the Chancellor says, "It has long been the settled law, that a consideration expressed or proved was necessary to give effect to a modern conveyance to uses. The consideration need not be expressed in the deed, but it must exist." And again—"The consideration has become a matter of form as to the validity of the deed, in the first instance in a court of law, and if the deed be brought in question, the consideration may be averred in pleading and supported by proof." These authorities seem to be conclusive, especially when not even a dictum has been cited on the other side, to show that the parol proof was properly admitted to make out that a sufficient consideration was paid by the grantees for the execution of the deed.

Judgment affirmed.

STATE TREASURER vs. THEODORE WOODWARD.

RUTLAND,
July,
1835.

A recognizance taken by a justice of the peace, where no form is given by the statute, is legal and valid in the terms which shall accomplish the object in view.

A clause in a recognizance for the appearance of a witness as follows,—“and not depart without leave of court,” is legal.

Debt on recognizance. On the 11th day of January 1831, a complaint was exhibited to Ira Jennings a justice of the peace against one Lull for disinterring the dead, a warrant issued, Lull apprehended and an inquiry had, upon which Lull was convicted and was bound over for trial to the next county court; and at the same time the defendant, who was a witness before the court of inquiry, was ordered and did enter into a recognizance for his appearance as a witness, at the same term of the county court to which Lull was bound over. The recognizance was as follows:

“*Rutland county, ss.* Be it remembered, that on the 11th day of January 1831, before Ira Jennings, a justice of the peace, for the county of Rutland, personally appeared Theodore Woodward and acknowledged himself indebted to the treasurer of the state of Vermont in the sum of one thousand dollars to be levied of his goods and chattels, lands and tenements, and for want thereof on his body, if default be made in the condition following:

“The condition of the recognizance is such that if the above named Theodore Woodward shall appear before the county court to be holden at Rutland in and for the county of Rutland on the 4th Tuesday of April next, to testify his knowledge in a certain prosecution in behalf of the state of Vermont against Almon Lull of Hartland, in the county of Windsor, and shall not depart without the leave of said court, then this recognizance to be void otherwise of force.”

An information was filed against Lull by the state's attorney at the next term of the court, and the prosecution was continued from term to term, until September term 1832, when Lull, the respondent, was called, and also the defendant, Woodward, who did not appear. Whereupon this action of debt upon the recognizance was commenced in the county court. Judgment rendered for the plaintiff, to which the defendant excepted, and the cause passed to this court for revision.

Smith & Langdon for defendant, contended, 1. That at the term the defendant was called to appear as witness in pursuance of his recognizance, the respondent was first called and made default of his appearance. A trial was not contemplated and could not have

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been had. The law under such circumstances does not require the witness to appear, and the non-appearance of the defendant is not a forfeiture of his recognizance.—2 Swift's Dig. 129.—7 Went. Pl. 243.

2. It does not appear the defendant was a witness in the trial before the justice court. The recognizance on the face must show an authority in the magistrate to take it.—2 Stark. Ev. 806.—Big. Dig. 473 and 389, ed. of 1818.—*Bridge vs. Force*, 7 Mass. Rep. 209.—*Johnson vs. Randall*, 7 Mass. Rep. 340.—*Rix vs. York et al*, 5 Bur. Rep. 2684.—*Rix vs. Hall*, 3 Bur. Rep. 1636.

3. The recognizance stipulates for an appearance at the next term of the county court, and not at a subsequent term.

The condition is, "The defendant and four others shall appear before the county court to be holden at Rutland on the 4th Tuesday of April next, to testify, &c. and shall not depart without leave of said court," &c. The words, "and not depart," are answered by a legal appearance at the first term. It would be doing great violence to the words of the condition, to construe it to include an appearance at a subsequent term.—*Kingsbury vs. Clark*, 1 Con. Rep. 406.—Bac. Abr. Bail, L.

1 Saund. Rep. 66.—The condition of a bond shall be taken formally and for the advantage of the obligor.

A recognizance taken by a justice of the peace and conditioned for an appearance from term to term would be invalid. The statute confers on him all the power he has in such cases, and if he exceeds his power his proceedings are void.—*Billings vs. Avery*, 7 Con. Rep. 226.

From the statute it clearly appears that the magistrate can only recognize the witness to appear at the next term.—Stat. ch. 9, sec. 2 and 3.—Ch. 7, No. 1, sec. 39.—Statute of 1828, p. 4, sec. 2. The county court has the whole control and direction of its witnesses. If the case is continued the witnesses must be recognized anew. So is the practice.—1 Chit. C. L. 486.—Bac. Abr. Bail, L.

4. If the recognizance runs from term to term the calling of the defendant at a subsequent term without notice, is not sufficient to charge him with the penalty. In England the respondent and witnesses are recognized to appear on the first day of the term; and it is a settled rule, if the bonds are not called on that day, but on a subsequent day, there must be notice.—Chit. C. L. 106.—Bac. Abr. Bail, L.

The justice derives no authority from the statute to recognize "not to depart without leave of the court.—Stat. p. 124.—2 Aik. 211.

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State's Attorney for the plaintiff.—This is an action of debt on a bond of recognizance entered into by defendant before a justice of the peace, conditioned for his appearance before the county court as a witness in behalf of the state under the statute.

The condition of the bond requires that the recognizor shall appear before the county court at the time specified therein, and not to depart without leave of said court.

The plaintiff contends that the defendant has not complied with the requirement of his bond in this, that he *has* departed without leave of the court.

By the continuance of the cause in which the defendant was required to testify, the court did in effect order the defendant to appear to testify on the trial of said cause at the subsequent term, or from term to term; and the defendant was bound to take notice at every term of the disposition of the cause by the court, and in no case to depart without leave of the court, until the cause was tried or dismissed from the docket.

The opinion of the court was delivered by

PHELPS, J.—It is objected in this case, that it does not appear that the defendant was a witness before the court of inquiry. Whether this be necessary or not is perhaps not a very important inquiry, inasmuch as it is to be inferred from the record that the defendant was present in the capacity of a witness, and in that character entered into the recognizance. The legal presumption is that the recognizance was regularly taken.

Another objection is, that the recognizance contains a requirement not authorized by law. The expression "and not depart without leave of court," is alleged to be illegal, and therefore not binding on the defendant. It is not to be questioned, that such a recognizance must follow the requirement of the law or it is nugatory. But there is nothing restrictive in the terms of the statute on this subject, nor is the form of the recognizance given. Whether the recognizance in question comes within the scope of the statute, must depend upon general principles. It is a sound rule of construction, that, whenever a power is given by statute in general terms, it is to be presumed that the power is intended to be perfect, and to include every thing necessary for the complete exer-

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cise of the power in effecting the purpose in view. A different rule would derange at once the whole machinery of our jurisprudence. If indeed the particular mode of exercising the power, in any and every supposable case, must be particularly defined, our statutory provisions must be inconveniently prolix, and, what is worse, in many cases which would arise, inapplicable and unavailing. Magistrates are required to bind over offenders for trial, and also to bind over witnesses to appear and give testimony on the trial. The object of these statutory provisions is obvious. It is, in one case, to secure a responsibility to the violated law of the land, and in the other, to secure to the public the evidence necessary to the due enforcement of that law. A recognizance in either case *to appear* simply, if the term is to be strictly construed, would be of no avail. The only way in which such a recognizance could be made to effect the purpose intended by the Legislature, is to construe the term in its most extended sense, and as requiring the appearance of the party, at any and at all times, when, in the course of the proceeding, it could be legally required. If such construction is adopted in this case, the clause objected to becomes unimportant, and the recognizance without it imports all for which the prosecution contends. It becomes necessary, in order to lay a foundation for the objection, to understand the term *appears* in its most limited sense, and to hold it satisfied by a single appearance for the professed purpose of trial, although a trial might in the end be evaded. Adopting this construction, the defendant's counsel insist, that any attempt on the part of the magistrate, to give to the recognizance any further operation, by means of an additional clause, is unauthorized and illegal. Were we to adopt this opinion we should at once render the statute idle and nugatory. Of what purpose is it to require the appearance of the party or the witness unless the one can be holden to trial or the other to give evidence? We cannot suppose that the legislature, with a single and rational object in view, intended their enactment to be so understood as to defeat their manifest purpose. Such a result is indeed sometimes brought about, by unskilful legislation, and by means of positive enactments. But it is a new doctrine that courts of justice are to lose sight of the legitimate purpose of a law, or, by forced and unreasonable construction, defeat the manifest purpose of the legislature. We are of opinion, that it is not only within the power, but the duty of the magistrate, so to take the recognizances, as to secure the attendance of the party, or the witness, as the case may be, until the proceeding is either finished, in the usual course, or disposed of by a legal disposition.

It follows that the expression, "and not depart," &c. is a material part of the condition. How long is it obligatory upon the party? To this question there is but one answer. It is obligatory until the purpose of the recognizance is answered. If he can be required to attend one minute, he can be required to attend so long as his attendance is necessary to the purposes of justice. Of this the court are to judge. The result is that the recognizance remains in force until discharged by order of court, or by some legal disposition of the prosecution the proceeding is at an end. This is the obvious import of the condition, and the only rational meaning that can be given to it.

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It is argued that the recognizance expires with the term to which it is returnable. It is difficult to discover how, in the absence of any statutory provision, this can be made out. It would not expire of itself until its purpose is answered. It was certainly the duty of the defendant to take notice at his peril of the proceedings in the cause, and if it be continued, to take notice that it is so with all its incidents. In short it is his duty so see that the purpose for which he is called into court is effected before he takes it upon him to decline further attendance. This rule is plain and simple, and if witnesses once understand it, they can find no difficulty or embarrassment in regard to their duty.

As to the supposition, that notice to the defendant was necessary before his recognizance was forfeited, we consider it a matter resting in the comity of the attorney, or, at most, in the discretion of the court; but not a matter of right in the defendant.

The circumstance that the respondent did not appear at the time, if of any importance in the case, is proper to be considered, when we are called upon to exercise our chancery powers in reducing the recognizance.

The judgment of the county court is affirmed.

CALEDONIA,
March,
1833.

ABEL EDGELL vs. BENNETT and LOWELL.

A widow is not to be rejected as a witness because her husband was interested, unless she has herself an interest in the event of the suit.

A widow has an interest to increase the personal fund and prevent debts from coming against the estate of her husband ; but that interest must be shown by evidence that her husband died in this state and left personal property to be administered upon.

The declarations of a grantor, made after the execution of a deed, are not admissible to prove it fraudulent.

A widow is not permitted to testify to declarations made by her husband during coverture, to contradict and impeach the testimony which he gave on a former trial between the parties.

It must appear that the county court erred in admitting or rejecting testimony, excepted to at the time, or this court will not reverse their judgment.

A decision of the county court on a motion for a new trial is not subject to be re-examined by this court.

This was an action of ejectment for certain lands in Lyndon. Plea, the general issue.

The plaintiff claimed title by virtue of the levy of an execution which was conceded to be regular. The judgment was, as appears from the case, predicated upon certain notes executed to the plaintiff by one Micajah M. Lowell previous to March, 1825. The defendants claimed title by virtue of a deed from said Micajah M. Lowell, dated March 22, 1825, prior to the levy of the execution, conveying said Lowell's whole farm for a consideration expressed of \$400. The plaintiff, who was a creditor of Lowell, contended that this deed was fraudulent and void as against creditors, and gave evidence to prove this fact, and that said Gideon Lowell was privy thereto.

The defendants introduced evidence to establish the deed as executed *bona fide* and for a valuable consideration.

Upon a former trial, (Vide 4 Vt. Rep. 405, the said M. M. Lowell, now deceased, was sworn as a witness, and the testimony which he then gave is now stated on oath by Judge Sias from his minutes. The plaintiff further offered Lois Lowell, widow of said M. M. Lowell, to testify to facts tending to show the sale to Gideon to be fraudulent, and also to testify to acknowledgments of her late husband to that effect. To this testimony the defendant objected, on the ground that she was interested on the part of the plaintiff, and not legally admissible to testify to the sayings and doings of her late husband in relation to the farm. But said Louis was permitted to testify.

After stating the evidence in the case, the court charged the jury as follows :

If you find from the evidence that M. M. Lowell was in embarrassed circumstances ; that he had little or no property in this state besides his farm in Lyndon ; that he sold this farm for the express purpose of putting himself or his property beyond the reach of legal process, and thereby to *delay* or *defeat* his creditors in the collection of their debts, it was a fraudulent conveyance on his part, although he sold the farm for *its full value*. If Gideon, at the time of sale, knew of the fraudulent intent of M. M. in selling his farm as aforesaid, then Gideon, as purchaser, was *privy* to said fraudulent intent, and it is void in his hands as to the creditors of M. M.

The court further observed, that if M. M.'s object was simply to pay his honest debts, and it was so understood by Gideon, then it was not a fraudulent sale. A debtor may pay one creditor and leave another unpaid ; or he may show preference to one creditor before another ; and this is not fraudulent.

The jury returned a verdict for the plaintiff to recover the seizin and possession of the land, and damages and costs.

The defendants made their exceptions, which were allowed and certified.

In this case there was also a motion for a new trial, because the jury, who rendered the verdict, before agreeing on the same, separated themselves from each other and from the custody of the officer having them in charge, and retired to their several lodgings and about the village wherever they pleased, and so continued separate from about 7 o'clock, A. M. on the 9th of December, 1832, until about 8 o'clock, A. M. to the 10th of December, 1832. Also because the jury, after having agreed on a verdict, separated without sealing up their verdict, and returned the same into court open, and without being sealed up. Also because, in ascertaining the damages in said action, each juror marked or set down his opinion of the sum proper to be found for the plaintiff as the annual rent of said land or farm sued for, and then the jury or foreman added together the several sums so found by each juror, and divided the amount by the number 12 and made the result, multiplied by 3, (the supposed number of years the premises were occupied by the defendants since the plaintiff's levy,) the damages in the action.

William Mattocks and James Bell for the defendants.

Isaac Fletcher and John Mattocks for the plaintiff.

CALEDONIA,
March,
1833.

Edgell
vs.
Bennett and
Lowell.

CALEDONIA,
March,
1833.

Edgell
vs.
Bennett and
Lowell.

The opinion of the court was delivered by

WILLIAMS, J.—The title of the plaintiff is by the levy of an execution in his favor against Micajah M. Lowell. The defendants' title is by deed from the same person of a date prior to the levy. The plaintiff contends, that the defendants' deed was fraudulent. Under a charge of the court, in which the law was very correctly given the jury, the title of the defendants was found to be fraudulent.

In the course of the trial, Lois Lowell, who was the widow of Micajah, the fraudulent grantor, was introduced as a witness. It appears that she was objected to, and was admitted by the court to testify. The inquiry now is, whether she was a competent witness; and this must depend on the question, whether she had any direct interest in the matter in controversy.

During coverture, the wife cannot be a witness where the husband has an interest. After the dissolution of the marriage by the death of the husband, she may be a witness, if not interested herself, and if the facts to which she is called to testify are such as are proper for her to relate. It was therefore no objection to this witness that her husband in his lifetime could not have been a witness; and there are no facts presented by the case by which we learn that she had any interest herself in the suit. It is true, that if the plaintiff fails to recover, he would be a creditor to the estate of her late husband for the amount of his execution; and it is also true, that the widow has an interest in some cases to prevent debts from coming against the estate, and also to increase the personal fund. Though not an heir, as was said in the argument, yet she is entitled to such portion of the personal estate as the court of probate shall think proper to assign to her, which shall not be less than one third which shall remain after the payment of the debts and funeral charges. If, therefore, her husband had died in this state, and left personal property more than enough to pay his debts, the witness would have an interest to have the plaintiff recover the lands levied on, and not on failure to recover come in as a creditor to the estate of her husband. To create this interest, however, it must have appeared that her husband died in this state the owner of personal estate, or left estate here to be administered upon. Neither of these facts are presented in the case, and the inference is strong, that neither of them is true. We cannot discover that she had any interest in the event of the suit which should exclude her from being a witness.

It does not appear that any question was made to the county

court whether the facts to which she testified were of that nature that she could not with propriety testify to them. It has been argued here, however, that her testimony as to the declarations of her husband ought not to have been received.

CALEDONIA,
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The declarations of a grantor, after making and delivering a deed, are not to be received to prove it fraudulent, and if testimony to that effect, whether coming from this witness or any one else, had been directly objected to and admitted by the court, the verdict must have been set aside. If the declarations of the husband were received as evidence of the facts related by him, it was mere hearsay, and therefore inadmissible; or if they were received to contradict the testimony which he had given on a former trial, (for it seems his testimony on a former trial was given in evidence in this,) they were inadmissible as conversations which had passed between husband and wife during coverture, and which are to be kept inviolable as family confidential conversations.—*Munroe vs. Twistleton*, Peake on Evidence, appendix 44. *Doker, Ex'r Doker, vs. Hasler, Ryan and Moseley*, N. P. Cases, 148.

None of these objections appear to have been made and presented to the court below, nor does the testimony of Mrs. Lowell appear to be of the character mentioned, but was principally in relation to the doings and sayings of Gideon Lowell, one of the defendants. We see nothing in her testimony to which she would have been precluded from testifying in the life-time of her husband, except the declarations of her husband after the execution of the deed; and it does not appear that this was objected to on that ground, or that the county court have decided that such testimony was admissible. There is no ground on which we ought to send this case to another trial, or reverse the judgment of the county court.

The motion for a new trial on account of the jury separating is in effect disposed of by the decision of the court in the case of *Bliss vs. Kittridge*. It was a motion addressed to the discretion of the county court, and their decision thereon is not subject to revision in this court.

The judgment of the county court is affirmed.

AN
INDEX
OF THE
PRINCIPAL MATTERS COMPRISED IN THIS VOLUME.

A

ABATEMENT.

1. The court will not, on motion, abate a writ in the name of a town, because it is served by a constable of such town.—*Charlotte vs. Webb and Newell*, 38

2. An officer attaches property, from time to time, on a writ, and leaves a single copy, agreeably to law, including a list of all the property taken, before the time of service expires.—*Held*, Such service is good on a plea in abatement.—*U. S. Bank vs. Taylor et al*, 116

3. If two writs be sued out on the same day, and both served at different times, the one first served will abate the other, but not *e. converso*.—*Morton vs. Webb*, 123

4. A trustee action pending will not abate a subsequent suit in the common law form between the principal parties and for the same cause of action. *Ib.*

5. The non-joinder of a dormant partner as plaintiff is no ground of abatement, nor can it be taken advantage of on trial. *Ib.*

6. A variance between the declaration before the justice and the new declaration filed in the county court, is no cause of abatement.—*Way vs. Wakefield*, 223

7. Coverture of the plaintiff should be taken advantage of by plea in abatement, and not by writ of error. Otherwise, if the wife is made defendant without the husband. And if one sues an executrix after her authority as such is determined by marriage, objection should be taken by plea in abatement. After pleading to the action, the defendant cannot question her representative character, nor support error for that cause; especially, if before judgment an administrator *de bonis non*

is substituted in her stead.—*Lyman's Adm'r vs. Albee's Adm'r*, 508

ACCIDENT.

No action of trespass can be maintained, where the injury complained of results from unavoidable accident, and no blame is imputed to the person doing the injury.—*Vincent vs. Stinehour*, 62

ACKNOWLEDGMENT.

See LIMITATION, 1.

ADMINISTRATORS.

See INSOLVENT ESTATE, 2.
LIMITATION, 2.
ASSETS, 1, 2.

ADVERSE POSSESSION.

See TENANTS IN COMMON, 1, 2, 3.

ALIAS EXECUTION.

See SCIRE FACIAS, 2.

AGENT.

1. Where an agent authorized to sell lands and receive payment therefor according to his discretion, upon a sale thereof takes a note and mortgage in his own name, upon which he receives a horse in payment, the horse immediately becomes the property of the principal.—*Waldo vs. Peck*, 434

2. In such case in an action of trover by the principal for the horse taken by an officer as the property of the agent, he is a competent witness for the principal. *Ib.*

3. A co-signer of a promissory note, who is but a surety for the other signer, may be constituted by the creditor an agent to collect the note of such other signer. And it is a good defence for the latter, when afterwards sued on the note, that he paid the amount to

such co-signer acting as agent of the creditor.—*Williams vs. Baldwin*, 503

4. After such agent had died insolvent, and his estate had been settled—*Held*, that his widow was a competent witness in support of this defence. *Ib.*

5. And it seems, that he and his wife might have been called as witnesses for the same purpose during his life-time; as the testimony would only have tended to charge him with a civil liability. *Ib.*

ALLOWANCE OF COMMISSIONERS.

See APPEAL, 1, 2.

AMENDMENT.

See BASTARDY.

APPEAL.

1. When the supreme court, upon the petition of the heirs of an estate, on the ground of fraud, accident or mistake, order an appeal from the decision of commissioners, allowing a claim to be entered in the county court, which is accordingly done by the clerk, whereupon the claimant files his declaration and proceeds to prosecute his suit from term to term, and finally suffers a non-suit, he cannot afterwards sustain an action against the administrator for the original allowance of commissioners, although no record of an appeal appears in the probate court.—*Probate Court vs. Rogers et al.*, 198

2. In such case, the order of the supreme court, to the court below, to enter an appeal, vacates the allowance of commissioners. *Ib.*

APPRENTICES.

See PAUPER, 2, 3, 4.

ARBITRATORS.

1. Where a party revoked the powers of an arbitrator, by parol, and the arbitrators in consequence of the revocation declined proceeding, he is not permitted to say that the revocation was not made.—*Hawley vs. Hodge*, 237

2. Where a person, who has submitted to an arbitrator, revokes, he must pay all damages which the other party has sustained, and to which he would not have been subjected, but for the submission. *Ib.*

ASSIGNMENT.

See CONSIDERATION, 1.

ASSETS.

1. Showing the administrator has, as such, recovered final judgment for land, is *prima facie* evidence of assets.—*Blodget vs. Col-lard's Adm'r*, 9

2. Showing the intestate had given a quit-claim deed, which might cover the same land, does not rebut this evidence of assets, or account for the same. *Ib.*

ASSUMPSIT.

See PLEADINGS, 5.
Book, 3.

ATTACHMENT.

1. A son, purchasing a farm, with a view to furnishing a home to an indigent father, and stocking said farm, and permitting the father there to reside and labor, does not subject the products of that farm to attachment on the father's debts.—*Brown vs. Scott*, 57

2. A log coal-pit, on fire, and partly burned, is incapable of attachment.—*Wilds vs. Blanchard*, 138

3. The removing property out of a state, by a person to whom the same has been delivered for safe keeping, by an attaching officer, does not dissolve the attachment.—*Utley vs. Smith*, 154.

4. Where the plaintiff, an officer, with a writ of attachment, went within five or ten rods of a wagon, which the creditor's attorney there turned out on said writ, the said wagon then being in the road, in full view; whereupon the said officer went away to attach other property, and did not go to said wagon, or remove it, or send any one to do so, or to keep control, or give notice to any one, and did not return to the same until an hour or more, and in the mean time the defendant, in good faith, and without notice, had purchased said wagon of the owner, and taken possession thereof, the defendant is entitled to hold the same.—*Fitch vs. Rogers*, 403

See EXECUTION, 1.

AUDITORS.

1. In an action on book, a defence arising from a tender and refusal, may be taken advantage of before auditors.—*Pratt vs. Gallup*, 344.

2. The parties are not competent witnesses to such tender, but it must be proved by other evidence than the oath of the party. *Ib.*

3. An account for goods sold, and charged after an action is commenced, is to be adjusted by auditors.

B

BAIL.

Number fifteen, section first, of the act regulating judicial proceedings, is a general enactment, comprehending all cases where there has been bail put in before the action is entered, either by endorsing the writ, or entering bail for an appeal.—*Ewins vs. Cal-houn*, 79

BAR.

See INSOLVENT ESTATE, 1, 2.

BASTARDY.

1. A complaint for bastardy is a civil suit and may be amended.—*Robie vs. McNiece*, 419

2. On a complaint for bastardy, all that is

required is, that the mother swear as to the begetting the child, and as to the father. It is not indispensable, that she swear, that she is a single woman. *Ib.*

3. After a verdict, it cannot be objected to such complaint, on a motion in arrest, that it is not stated, that the mother is with child, or had been delivered. *Ib.*

4. A prosecution for bastardy is in effect but a civil suit, though conducted under some of the forms of a criminal proceeding.—*Gray vs. Fulsome and Fellows*, 452

5. When the defendant in such prosecution is surrendered in court by his bail, the recognizance of the bail is thereby discharged. Such surrender should be pleaded as matter of discharge, and not of performance; but if pleaded by way of performance, and no objection taken by special demurrer, the court will give it its legal effect as a discharge. *Ib.*

See PAUPER, 1.

BILL IN CHANCERY.

See PLEADING, 7.

BOOK ACCOUNT.

1. It is the duty of a justice of the peace, in an action on book account, to adjust the account up to the time of trial. So of the auditors in an appealed case.—*Martin vs. Fairbanks*, 97

2. An article delivered on a credit, not expired at the commencement of the suit, may nevertheless be allowed, if the credit have expired before trial. *Ib.*

3. When goods are purchased, and the purchaser reserves to himself the right to pay in certain property, lumber, produce, &c., he may pay within the time without demand or designation, and if not paid, the creditor may sustain an action on book or assumpsit without demand.—*Way vs. Wakefield*, 223

See JURISDICTION, 3, 4, 5.

BOND TO CONVEY.

1. Where a party binds himself to execute a good and valid deed of land, with the usual covenants, he is obliged to give a deed which conveys a good and sufficient title.—*Stow vs. Stevens*, 27

2. Where an obligor binds himself, upon the payment of money and the execution of notes, at a certain time, to convey land by a good and valid deed, and previously conveys the same to another; the obligee must, in assigning a breach, aver his readiness to pay the money and execute the notes, although he need not tender a performance. *Ib.*

3. In such case, where money was paid at the time the bond was executed under seal, the obligee is at liberty to regard the act of the obligor, in deeding the land to a stranger, as a rescinding of the contract, and may resort to the common counts for his remedy. *Ib.*

BOUNDARIES.

1. The laying out and establishing the limits and bounds of a village in these words—"Commencing with Samuel Hall, thence to William Scales, also including John W. Dana, Jason and Warren Britt and Thomas Lyford,"—is uncertain and insufficient.—*Cutting vs. Stone*, 471

2. It must be so described as to include territory, with certain outlines and boundaries. *Ib.*

3. Where the boundaries mentioned in a deed of conveyance are inconsistent with each other, those are to be retained which best subserve the prevailing intention manifested on the face of the deed.—*Gates vs. Lewis*, 514

See POSSESSION, 1, 2.

C

CHANCERY JURISDICTION.

See CHARITABLE USES, 1, 2, 3.

CHARITABLE USES.

1. Courts of chancery had jurisdiction of bequests to charitable uses, before the statute of 43d Elizabeth, by virtue of their equity jurisdiction.—*Burr's Ex'rs vs. Smith et al*, 241

2. The law, as now established, in relation to gifts, &c. and to charitable uses, is not derived from that statute, but existed anterior. *Ib.*

3. A gift to a charitable use may be decreed, notwithstanding the objects are vague and indefinite, and notwithstanding the persons who are to carry into effect the intent of the testator are a society unincorporated;—thus a gift to the treasurer for the time being of the American Bible Society, &c. held to be good. *Ib.*

4. *Quere*, Whether the 41st section of the constitution of this state does not render all societies for the advancement of religion and learning, and for other pious and charitable purposes, capable of receiving gifts, and holding property without incorporation. *Ib.*

COLLECTOR OF TAXES.

1. A receipt, signed by a collector, for a tax bill and warrant, is evidence in a suit against such collector and his sureties, on their bond to indemnify the town; and *prima facie* evidence that the rate-bill was regularly made out.—*Charlotte vs. Webb et al*, 38

2. In such suit, an extent issued by the treasurer of the state against the inhabitants of the town, which has been paid by them, is admissible in evidence, without showing the previous proceedings of the treasurer. *Ib.*

3. Where a collector receives a rate-bill for a state tax, signed by one of the selectmen, and promises to procure the signature of the other, the jury may presume that the

signature of the other selectman was obtained. *Ib.*

4. The rule of damages, in a suit against a collector and his sureties, is the amount of the rate-bill not paid over agreeable to the warrant. *Ib.*

See PLEADINGS, 1.

COMMISSIONERS.

See INSOLVENT ESTATE, 2.

LIMITATIONS, 2.

COPY.

See ABATEMENT, 2.

SUMMONS, 1, 2.

COMMENCEMENT OF A SUIT.

1. The time of commencement of a suit to avoid the statute of limitations, is the day when the writ issued, but such writ must be served and returned.—*Day vs. Lamb*, 426

2. The date of the writ is considered *prima facie* evidence of the day when the same is issued. *Ib.*

CONSIDERATION.

1. The assignment of a chose in action for a valuable consideration is a sufficient consideration for a promise of the debtor to make payment to the assignee.—*Bucklin vs. Ward*, 195

2. Some consideration is necessary to make a deed of land valid.—*Wood vs. Beach et al.* 522

3. Parol proof is admissible to show a consideration where none is expressed in the deed, or the sum is left blank. *Ib.*

CONTRACT.

1. When a debtor procures a person to purchase a note against him, under a contract to pay a specified sum, and after the purchase wholly donies the agreement, and refuses to pay the same, or carry the agreement into effect, he cannot set up this agreement in defence to an action brought by the purchaser as endorsee of the payee of the note.—*Raymond vs. Williams*, 230

2. Where a party wholly fails to perform a contract, by the time stipulated, and gives no reasonable excuse therefor, he cannot require a specific performance of the other party, by an offer to fulfil on his part, after the time.—*White vs. Yaw et al.*, 357

See NOTICE, 1.

COVERTURE.

See ABATEMENT, 7.

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D

DAMAGES.

See ARBITRATORS, 2.

DECLARATION.

See PLEADING, 2, 3, 4.

VARIANCE, 1.

ABATEMENT, 6.

DEDIMUS POTESTATEM.

The court, upon the application of one party, and without the consent of the other, will issue a *dedimus potestatem* to take testimony in a foreign jurisdiction.—*Farnsworth vs. Pierce*, 83

DEED.

Where the particulars, in the description of land in a deed, are inconsistent and incongruous, the court may reject a part and give effect to the deed. In doing this, they will be guided by the intent of the parties, as gathered from the deed.—*Hull vs. Fuller*, 100

See BOND TO CONVEY, 1, 2, 3.

POSSESSION, 1, 2.

BOUNDARIES, 3.

CONSIDERATION, 1, 2.

DEPOSITION.

When a deposition contains matter improper to be given in evidence, it should not be delivered to the jury, but the party should be permitted to read only such parts as are admissible.—*Wood vs. Stewart*, 147

DISCHARGE.

See PLEADINGS, 8.

BASTARDY, 5.

DISCRETION OF COURT.

See PRACTICE, 2.

ERROR, 2.

DESCRIPTION.

See EJECTMENT, 1.

DEED, 1.

E

EJECTMENT.

1. After verdict in an action of ejectment, if the lands are so imperfectly described that it cannot be known for what the verdict was given, the judgment should be arrested.—*Clark vs. Clark*, 190

2. The action of *ejectment*, for the non payment of rent against a lessee may be sustained under any statute without a demand of the rent, though the lease was executed before the statute.—*Maidstone vs. Stevens*, 187

3. The lease, in terms, giving the right of entry only after the rent in arrear "shall have been lawfully demanded," does not alter the case. *Ib.*

4. Receiving of rent, subsequently, does not waive the right to sustain this action, unless it be shown that the receiver knew of the arrear rent at the time; and the rent received, to have this effect, should have accrued after the forfeiture existed or the action commenced. *Ib.*

ENDORSEMENT.

See PLEADINGS, 6.

ERROR.

1. Writ of error does not lie to correct a misprison of the clerk, in entering up judgment for too large a sum, but the remedy is by application to the court in which the record is, to amend it.—*Campbell vs. Patterson*, 86

2. The rules of court, as to the time of pleading, are matters to be regarded in that court only. Their enforcement or dispensation cannot be assigned for error.—*Way vs. Wakefield*, 223

3. Every case passing to the supreme court on exceptions, is to be considered as a proceeding in error, and decided on *inspection of record*, not in the nature of a motion or petition for new trial. Hence the questions of fact cannot be re-examined, whether found by the jury or the court on an issue of fact. *Ib.*

4. *Dictum*—A petition for a new trial under the statute of 1829 is addressed to the *discretion* of the county court, and a refusal to allow it or a dismissal of the same, on hearing, cannot be revised by exceptions, as on error, by the supreme court.—*Chase vs. Davis*, 476

5. The receiving and entertaining a dilatory plea, contrary to the *rules of practice* in the county court, cannot be assigned for error or be revised in the supreme court. *Ib.*

6. It must appear that the county court erred in admitting or rejecting testimony, excepted to at the time, or this court will not reverse their judgment.—*Edgell vs. Bennett and Lowell*, 534

See ABATEMENT, 7.

EXCEPTIONS.

It is not an available ground of exception, that the county court admitted parol proof of the contents of a paper supposed to be lost, upon proof of loss, which this court might deem unsatisfactory.—*Janes, adm'r. vs. Martin et al.*, 92

See ERROR, 2, 3, 4, 5.

EVIDENCE.

1. The opinion of witnesses is not proper evidence, except in cases depending upon skill in some science or art, or when the opinion of the witness is derived from personal observation of the transaction.—*Lester vs. Pittsford*, 158

2. The opinion of a witness, not a professional man, formed upon a representation of the facts, as given in evidence, is never admissible. *Ib.*

See COLLECTOR OF TAXES, 1, 2, 3.

WITNESS, 1, 2, 3, 4.

EXECUTION.

If A agrees to build a barn for B, by a stipulated time, and to take the timber on the land of B—*Held*, That the property of the timber cut and drawn for the purposes of finishing the barn, did not belong to A, so as to be taken in execution for his debts.—*Gallup vs. Joselyn*, 334

See PRACTICE, 1.

EXEMPTION FROM ATTACHMENT.

1. For taking property on execution, which is by statute exempt, *trespass* may be sustained.—*Dow vs. Smith*, 465

2. A two year old heifer forward with calf, when the owner has no other cow, is a cow within the meaning of the statute, and is exempt from execution. *Ib.*

3. Though the owner of said heifer may have in his possession a cow, which he has sold and cannot retain, though under such circumstances that his creditors might attach her, yet that does not subject the heifer to attachment. *Ib.*

F

FEME SOLE.

See GUARDIAN, 1, 2, 3, 4.

FRAUD.

1. An action can be maintained for a false and fraudulent representation of the responsibility of a person, whereby an injury has been sustained by the one to whom it is made. *Weeks vs. Burton*, 67

2. A representation that a note is good is equivalent to representing that the maker is responsible. *Ib.*

FRAUDULENT REPRESENTATION.

See FRAUD, 1, 2.

PAROL EVIDENCE, 1.

G

GUARDIAN.

2. The *marriage of feme sole*, guardian, *extinguishes* her power as guardian.—*Field vs. Torrey*, 372

2. When she, after such extinguishment, continues to have charge of the property of the ward, and to receive rents and profits, the ward, after full age, may sustain the action of account against her, as bailiff. *Ib.*

3. In such case, a plea to the jurisdiction of the court, insisting that the whole matter is within the jurisdiction of the court of probate, cannot be sustained. *Ib.*

4. The action of account, after the termination of a guardianship, may be sustained in the courts of common law, unless the guardian has accounted in the probate court. *Ib.*

H

HIGHWAY.

1. In an action against the town for damage sustained by the insufficiency of a road or bridge, it is not enough for the plaintiff to show the road out of repair, and that an injury has been sustained, but he must show, *prima facie* at least, that the injury was occasioned by the defect.—*Lester vs. Pittsford*, 158

2. A highway which was established before the passing of the act of Nov. 7, 1800 cannot, when subsequently discontinued, be legally set over under the second section of that statute, except to the person on whose land it is situated.—*Pettibone vs. Purdy*, 514

I

IMPEACHMENT OF WITNESSES.

To impeach a witness, the inquiry must be as to his character for truth and veracity, and no inquiry can be had whether the witnesses are common prostitutes.—*State vs. Smith*, 141

IMPOUNDING.

1. If sheep are taken, damage feasant, it is sufficient, if notice is given to the owner in twenty-four hours after they are delivered to the pound-keeper.—*Moore vs. Robbins*, 363

2. Such notice need not be to appoint appraisers, if damages are not claimed by the impounder. *Ib.*

3. When personal notice is given, it may be given by an agent of the impounder if the owner actually has the notice, and receives it as coming from the impounder. *Ib.*

INDICTMENT.

1. Every material fact to constitute the crime must be alleged in an indictment, with time and place.—*State vs. Bacon*, 219

2. In an indictment for false tokens and swindling, *the procuring the goods* is a material fact, and if not alleged with time and place, judgment will be arrested. *Ib.*

See ROAD COMMISSIONERS 1, 2.

INSOLVENT ESTATE.

1. The mere representation of insolvency, without the appointment of commissioners on an estate does not prevent creditors from sustaining actions against the administrator.—*Blodget vs. Collard's adm'r*, 10

2. Where a person, having his domicile in New-Hampshire, dies there, and his estate is there represented insolvent, and commissioners appointed, the debt of a creditor residing there, who neglects to present his claim to the commissioners, is barred. Nor can such creditor move into this state, and have his claim allowed by commissioners appointed here, where an ancillary administration is taken out, and a commission of insolvency issues. The object of the administration here is only to prove the debts in this state.—*Hunt vs. Adm'r of Gookin*, 170

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J

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PLEADINGS, 2, 3, 4.

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JOINDER OF PARTIES.

The husband of the oratrix must be joined, unless the right claimed is in opposition to his rights, so that he should be made defendant.—*Bradley vs. Emerson et al*, 369
See ABATEMENT, 5.

JOINT TENANTS.

See LEGACIES, 1, 2.

JUDGMENT.

A judgment is considered as rendered on the last day of the term.—*Day vs. Lamb*, 426

JURISDICTION.

1. Under number nine of the judiciary act, if a note is over \$100, but reduced by endorsement under the sum, the county court has jurisdiction.—*Middlebury Bank vs. Tucker et al*, 144

2. An offender, escaping into Canada, and brought back against his will, and without the assent of the authorities of the province, may yet be tried and punished for the offence committed here.—*State vs. Brewster*, 118

3. The debit side of the plaintiff's book, as presented to him by the justice, is by inspection to determine the jurisdiction in the action on book.—*Stone vs. Winslow*, 338

4. Because there is another item which he might charge, whether interest or any thing else, which if charged would make the account exceed one hundred dollars, that does not take the case out of the justice's jurisdiction. *Ib.*

5. If, by the defendant's request, that item of interest is computed in striking a balance, he in writing waiving all exception, that will not subject the case, after appeal, to being dismissed by the county court, if the judgment both of the justice and auditor is less than one hundred dollars. *Ib.*

JUSTICE OF THE PEACE.

See JURISDICTION PASSIM.

BOOK ACCOUNT, 1.

L

LEGATEES.

1. A legacy to three sisters of the plate, musical instruments, pictures, &c. which belonged to their father, gives them a joint tenancy in the goods bequeathed.—*Minor's ex'r vs. Richards*, 203

2. Where two of the legatees died in the life of the testatrix, held that the legacy survived to the remaining legatee, and did not pass to the residuary legatee, under a bequest of the residuum and of all lapsed legacies. *Ib.*

LIMITATION.

1. An unqualified acknowledgment, that a debt is due, is conclusive evidence of a new promise, and takes a case out of the statute of limitation.—*Barlow vs. Bellamy*, 54

2. In an action on an administrator's bond, to an assignment as a breach, of the non-payment of a debt allowed by commissioners, the statute of limitations is not a good plea.—*Probate Court vs. Chandler*, 111
See COMMENCEMENT OF SUIT, 1, 2.

M

MORTGAGE.

1. Although a mortgagee, suing in ejectment, must prove his debt, in order to recover, yet a mortgagee in possession, who sues a stranger in trespass or case for a nuisance, need not show his note or bond secured by the mortgage.—*Hull vs. Fuller*, 100

2. In such action, the grantor of the plaintiff is a competent witness for him, unless the title is put in issue by the pleadings. *Ib.*

3. B held certain promissory notes against W, which were secured by a mortgage on real estate. These notes were afterwards given up to W, upon his executing new notes for the sum due, but without any intention on the part of B to affect his mortgage security. *Held* that this exchange of notes did not defeat the mortgage, so as to enable the creditors of W to levy upon and hold the land against B:—especially, as it did not appear that they had been misled, or induced to believe the mortgage debt actually paid.—*Dana et al vs. Binney et al*, 493

N

NEW TRIAL.

A decision of the county court on a motion for a new trial is not subject to be re-examined by this court.—*Edgell vs. Bennett and Lowell*, 534

NOTICE.

1. Where in a written contract, a party was under obligation not to sell a factory, &c. without giving ninety days notice, and likewise allowing him a preference. It was held that such notice might be proved by circumstances, as the acts of the parties, &c.—*Wood vs. Stewart*, 149

2. The party for whose benefit such notice is to be given, may, by his conduct, waive the same. *Ib.*

See IMPOUNDING, 1, 2, 3.

NUISANCE.

The erecting and using a church on lands to which a party has a doubtful claim, for which he has commenced his action of ejectment at law, is not such a nuisance or waste as to entitle him to the interposition of this court in granting an injunction.—*White vs. Booth et al*, 131

O

ORIGINAL UNDERTAKING.

1. Where a person called a physician to
69

attend, at his house, upon a female, who had been brought up in his family, but after coming of age, had the control of her time, and had resided in different families, but when taken sick, resided in his family as a servant, without any stipulated wages—*Held*, Such person is liable as upon an original undertaking. *Clark et al vs. Waterman*, 76

2. *Dictum*—A person is not ordinarily liable to pay for medical attendance on his servant. *Ib.*

OPINION OF WITNESSES.

See EVIDENCE, 1, 2.

OPINION OF THE COURT.

The court are not under obligation to give any opinion to the jury on the weight of testimony.—*Vincent vs. Stinehour*, 62

OVERSEERS OF POOR.

See PAUPERS, *Passim*.

P

PAROL EVIDENCE.

Parol evidence is admissible to sustain an action for falsely and fraudulently representing a person of sufficient ability to pay a certain amount.—*Ewins vs. Calhoun*, 79
See CONSIDERATION, 3.

PAUPERS.

1. If a woman, having no settlement in this state, pregnant with a bastard child, is procured by the overseers of the poor of the town where she resides, to go into another town to be delivered, and is there delivered—*Held*, That the child is considered as born in the town from which she is so procured to depart.—*Plymouth vs. Windsor*, 327

2. An order of a justice of the peace, in pursuance of the 20th section of the act of March 31, A. D. 1797, relating to legal settlement, and the support of the poor, is not an essential pre-requisite to the exercise of the power to bind out poor children as apprentices, which is vested in the overseers of the poor by the 18th section of said statute. *Warner vs. Sweet et al*, 446

3. Nor is it required, to authorize such a binding by the overseers, that the child should be permanently chargeable to the town. In A. D. 1826 a widow with her children became chargeable, and were relieved by the town; she went out to service, and her children were placed by the overseers in different families, where they remained till A. D. 1832. One of the children, of tender age, was thus received by the plaintiff, in A. D. 1826, with the assent of the mother, and under a promise of the overseers to bind him to the plaintiff by indentures of apprenticeship. *Held*, that the overseers might lawfully execute indentures to the plaintiff in A. D. 1832, although the town had incurred no actual expense in supporting the child since A. D. 1826.

4. Such children may be bound by the overseers to farmers, as well to tradesmen and mechanics. *Ib.*

PLEADINGS.

1. In a plea of justification, by a collector, under a rate-bill and warrant to collect a tax, voted by a town, it is not necessary to set forth the purposes for which the tax was voted. Nor is it necessary to allege, that the town was a corporation, or to show any charter of incorporation.—*Briggs vs. Whipple*, 15

2. In declaring on a jail bond, it is sufficient to allege that the prisoner was confined in jail on *mesne* or final process, stating the process without alleging the previous proceedings.—*United States Bank vs. Tucker et al.* 134

3. More is surplusage, and does not vitiate, unless it shows an illegal imprisonment. *Ib.*

4. If there exist any such defect in the previous proceeding as renders the imprisonment illegal, it should be pleaded by the defendant. *Ib.*

5. When a count in *general assumpsit* may be used,—*Way vs. Wakefield*, 223

6. "And the said note was afterwards by the said A. B. on the day and year last aforesaid, at W. aforesaid, endorsed and delivered to the plaintiff," is a sufficient allegation of the assignment or endorsement of a note.—*Brooks vs. Edson*, 351

7. All the equity which entitles a person to relief should be stated in the bill.—*White vs. Yaw et al.*, 357

8. A plea in discharge of the cause of action needs only to allege those facts which constitute the discharge.—*Gray vs. Fulsome et al.*, 452

See BASTARDY, 5.

POSSESSION.

1. A party, taking possession of a part of land conveyed by his deed, is in legal construction in possession of all the land described. But it is necessary that the deed give a definite and certain extent to the land, otherwise he will be deemed in possession only to the extent of his actual possession.—*Hull vs. Fuller*, 100

2. Where commissioners, appointed by the legislature, to re-survey and complete an allotment of a town, alter some of the original lines, and the parties in possession subsequently convey agreeably to the corrected lines, this is sufficient evidence of an acquiescence and will bind the parties and their grantees. *Ib.*

See TENANTS IN COMMON, 1, 2, 3.

PRACTICE.

1. In an action on a jail bond, where the execution issued in pursuance of a rule of court, an inquiry cannot be made whether the execution issued regularly, or whether the rule was complied with.—*Gibson vs. Scott et al.*, 147

2. When a proceeding depends upon the discretion of the county court, guided by the particular circumstances of the case, and not on any certain known rule of law, this court will not control it.—*Bucklin vs. Ward*, 195

PRESUMPTION.

1. The court will not *presume* an officer of general jurisdiction proceeded irregularly.—*United States Bank vs. Tucker et al.*, 134

2. If stolen goods are found in the possession, or under the control of the prisoner, it is a question for the jury, how far, under all circumstances, that possession raises a presumption of guilt in the particular case.—*State vs. Brewster*, 118

PROBATE.

See INSOLVENT ESTATE, *Passim*.

PROMISSORY NOTES.

1. No particular form of words is necessary to constitute a promissory note.—*Hitchcock vs. Cloutier*, 22

2. A contract in the Province of Canada, acknowledged before a notary, does not become a debt of record, so that assumpsit cannot be maintained thereon. *Ib.*

R

RATE BILL.

See COLLECTOR OF TAXES, 1, 3, 4.

RECEIPT.

See COLLECTOR OF TAXES, 1.

RECOGNIZANCE.

1. In an action of debt on recognizance, taken for the appearance of a person arrested on a criminal process, it is no defence that the jury who tried the case were taken from the town to which the fine, on conviction, would be payable.—*Middletown Treasurer vs. Ames et al.*, 166

2. A bond of recognizance, taken by a judge, conditioned for the appearance of a prisoner at the next county court, when the cause has gone on exceptions to the supreme court, is void, notwithstanding the cause afterwards came to said county court for new trial.—*State vs. Seaver et al.*, 480

3. A recognizance taken by a justice of the peace, where no form is given by the statute, is legal and valid in the terms which shall accomplish the object in view.—*Treasurer vs. Woodward*, 529

4. A clause in a recognizance for the appearance of a witness as follows,—“and not depart without leave of court,” is legal. *Ib.*

RECORD.

1. A party may not in a plea contradict the record of a court or magistrate, or impute to them fraud.—*Middletown Treasurer vs. Ames et al.*, 166

RELEASE.

A release to one of two joint *tort feorsors*, is equivalent to a satisfaction, and entures to the benefit of both.—*Brown vs. Marsh*, 320

RENTS AND PROFITS.

See TENANTS IN COMMON, 2, 3.

EJECTMENT, 2, 3, 4.

RETURN.

A return of a levy on an execution on land, according to the form given in Chipman's Reports, held valid to pass the land from the debtor to the creditor.—*Chase et al vs. Bowen*, 431

REVOCATION.

See ARBITRATORS, 1, 2.

ROADS.

See HIGHWAY, *Passim*.

ROAD COMMISSIONERS.

1. The county court have power to issue an execution on the decree of road commissioners, at the petition of a majority of the former petitioners.—*Hill et al vs. Sunderland*, 215

2. Other persons signing said petition is immaterial, and their names may be erased by order of court. *Ib.*

3. In such case the execution is to issue for the money to be paid into the clerk of the court, and the county court will appoint an agent to expend the money upon the road or bridge, under the general power of the court. *Ib.*

4. A town is liable to an indictment for not erecting a bridge, ordered by the road commissioners.—*State vs. Whitingham*, 390

5. It is not necessary, in such indictment, to set forth that the selectmen had, previous to such order, neglected to build such bridge. *Ib.*

6. Where an appeal was taken from the decision of the road commissioners, and a committee appointed by the county court, such committee were not required to make any new order, but only to reverse or affirm the order of the commissioners. *Ib.*

RULE OF COURT.

See PRACTICE, 1, 2.

S

SCIRE FACIAS.

1. *Scire facias* on a judgment, to procure execution against the party to said judgment, is not an original suit, but a continuation of the former action.—*State vs. Foster*, 52

2. The execution thereby procured is an execution on the former judgment. *Ib.*

3. Where the debtor in execution has been committed to jail, and released on taking the poor man's oath, an alias execution against the goods of said debtor cannot issue on the

same judgment, without *scire facias*, after more than eight years after said release.—*Allen vs. Carpenter*, 397

SELECTMEN.

1. Where a note was given to the selectmen of three towns, and prosecuted to final judgment in the name of said towns, under the directions of a special agent appointed by one of said towns, and the money collected and paid to said selectmen by the sheriff—*Held*, That said selectmen were not authorized to receive said money and to discharge the sheriff.—*Middlebury et al. vs. Rood*, 123

2. The authority given by the statute to the selectmen over the prudential affairs of the town does not authorize them to receive the moneys of the town and execute discharges therefor. *Ib.*

SETTLEMENT.

Where a single woman, in the year 1812, went to her brother's in T., carried her beds, chests, &c. which were kept there for a number of years, without being warned out, and to which place she usually returned after occasional absences, *Held*, That she thereby gained a settlement in T.—*Newbury vs. Topsham*, 407

See PAUPERS, 1, 2, 3, 4.

SHERIFF.

1. A jail bond is taken primarily for the benefit of the sheriff, who may institute a suit thereon for his own benefit, control and release the same.—*Weeks vs. Stevens*, 72

2. *Quere*, Whether a bankrupt sheriff would be permitted fraudulently to discharge such bond. *Ib.*

3. The purchaser of personal chattels, at a sheriff's sale, is not affected by any irregularity or impropriety in the officer's proceedings, but the officer is liable therefor to the party injured.—*Adm'r of Jones vs. Martin et al*, 92

See ABATEMENT, 2.

SLANDER.

The following words—"He snaked his mother out of doors by the hair of her head: it was the day before she died," are not actionable in themselves.—*Billings vs. Wing*, 439

SPECIFIC PERFORMANCE.

See CONTRACT, 2.

STOLEN GOODS.

See PRESUMPTION, 2.

SURETY.

1. Where a debtor is admitted to the liberties of the jail yard, if the creditor makes a contract with him, without the knowledge of the surety, which induces or causes him to depart or escape the liberties, he cannot recover on the bond.—*Conant vs. Patterson, et al*, 163

2. After such escape, the creditor and debtor cannot create a new liability against the surety. *Ib.*

SUMMONS.

1. An original writ of summons cannot be served *by reading*, without copy.—*Chase vs. Davis*, 476

2. In case the citation attending such petition be not served by copy, the petition cannot be sustained. *Ib.*

SURVIVORSHIP.

See LEGATEES, 1, 2.

T

TENANTS IN COMMON.

1. The possession of a tenant in common is not presumed to be *adverse* to his co-tenant, until proved so to be.—*Catlin vs. Kidder*, 12

2. Pernancy of profits for a length of time, especially if short of the statute of limitations, will not make the possession of a tenant in common adverse, or amount to an ouster of his co-tenant. *Ib.*

3. The tenant of a tenant in common is not estopped from purchasing the title of the other tenants in common; nor are their deeds to him, while in possession, void. *Ib.*

TENDER.

See AUDITORS, 2.

TITLE.

See BOND TO CONVEY, 1.

TORT FEASORS.

See RELEASE, 1.

TOWNS.

See HIGHWAY, 1.

PLEADINGS, 1.

SELECTMEN, 1, 2.

RECOGNIZANCE, 1.

ROAD COMMISSIONERS, 4; 5.

TRESPASS.

See ACCIDENT, 1.

MORTGAGE, 1, 2.

EXEMPTION FROM ATTACHMENT, 1.

TROVER.

1. Where A procured a coat for the use of B, who had permission to wear it, and who sold it to C, and C used it as his own, claiming to be the owner of it, *Held*, That A might maintain trover against C.—*Riford vs. Montgomery*, 411

2. That the court were under no obligation to instruct the jury that they might infer a gift of the coat from A to B. *Ib.*

TRUSTEE PROCESS.

See ABATEMENT, 4.

U

USURY.

1. Where the maker of a note infected with usury, in consideration that the holder should

cancel or discharge the same, promises to give a new note, deducting the usurious excess, such promise will be enforced in law.—

McClure vs. Williams, 210

2. Sheep or cattle let pursuant to the custom or usage of farmers is not usury, though the risk of the life of the animals be, by the contract, on the hirer, if such be the usage.

Whipple vs. Powers, 457

3. If money be loaned and by fiction called sheep or cattle, or if there be any color or fiction to bring the loan within the proviso of the statute, it is *usurious*. *Ib.*

4. The giving up a sheep or cattle contract, without the same being paid, and taking another therefor, fictitiously pretending to let cattle, where none in fact existed, is *usurious*. *Ib.*

V

VARIANCE.

Where a declaration, before a justice of the peace, states a note payable to A. B. or bearer, and when appealed, the plaintiff files his declaration, omitting "or bearer," the suit will not be dismissed for a variance.—*Bucklin vs. Ward*, 195

See ABATEMENT, 6.

VILLAGE.

See BOUNDARIES, 1, 2.

W

WAIVER.

See NOTICE, 2.

WIDOW.

See WITNESS, 1, 2.

WITNESS.

1. A widow is not to be rejected as a witness because her husband was interested, unless she has herself an interest in the event of the suit.—*Edgell vs. Bennett et al*, 534

2. A widow has an interest to increase the personal fund and prevent debts from coming against the estate of her husband; but that interest must be shown by evidence that her husband died in this state and left personal property to be administered upon. *Ib.*

3. The declarations of a grantor, made after the execution of a deed, are not admissible to prove it fraudulent. *Ib.*

4. A widow is not permitted to testify to declarations made by her husband during coverture, to contradict and impeach the testimony which he gave on a former trial between the parties. *Ib.*

See MORTGAGE, 2.

EVIDENCE, 1, 2.

AGENT, 2, 3, 4, 5.

RECOGNIZANCE, 4.

ERROR, 6.

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